

THE
DEFENCE

OF

FRANCIS, ³¹⁰

Late Lord Bishop of *ROCHESTER*,

At the BAR of the

House of LORDS,

On *Thursday* the 9th, and *Saturday* the 11th,
of *May*, 1723.

AGAINST THE

BILL then depending for inflicting PAINS
and PENALTIES on him.

BY

WILLIAM WYNNE, Esq;

One of his Lordship's Counsel.



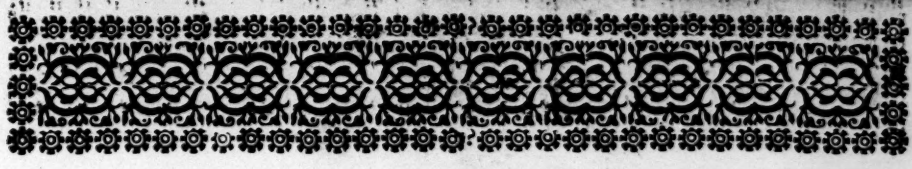
L O N D O N :

Printed for JONAH BOWYER at the *Rose* in
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(Price 1 s. 6 d.)

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Mr. WYNNE's D E F E N C E

O F

Francis, *late Lord Bishop of Rochester, on
Thursday the 9th of May.*

May it please your Lordships,



A M of Counsel for this Reverend Prelate, and however unnecessary I know Apologies to be before your Lordships, who are always ready to hear what the youngest and most unexperienced Person has to offer; yet it becomes me to say something for my first Appearance at your Lordship's Bar, in a Matter of the last Consequence; and it was the Desire of this Reverend Prelate, rather to make his Defence by such weak Hands as mine, as if he was persuaded, that his Cause needed not the Assistance of Art or Experience, in order to move the Passions, or to impose upon the Reason of his Hearers; which he knows to be but an impotent Help to Persuasion, in comparison of Truth and Innocency. He appears before those, who (he hopes) will regard plain Facts and positive Law; and Truth, notwithstanding all the Disadvantages of an unskilful Pleader, will, he hopes, at last prevail.

For my own part, since your Lordships have assign'd me for his Counsel, I shall be under no Apprehensions of Danger or Displeasure in performing my Duty to him, in humbly offering every thing I think necessary for his just Defence; and I will not doubt, but I shall be fully and favourably heard. And tho' it is his Lordship's Misfortune to be already pre-judg'd in another Place, and to be condemn'd without Doors, by some few vulgar mislead Apprehensions; yet he hopes better Things of you, my Lords: He does not doubt, but that your Lordships, who in Matters of less Importance proceed with Calmness, Justice and Prudence, will be careful not to deviate from those Measures, in a Matter which demands the greatest Caution and Deliberation: For it is the Case, the Reputation, the Liberty, the Fortune, and (I was going to say) the Life of a most Learned Prelate; because some Circumstances of this Bill are so cruel and extreme, that it is little better than if it had affected Life itself.

Every one that is a Friend to this Bill, must avow, that it is not to be offer'd without an evident and cogent Necessity. But, I hope, my Lords, (tho' the Grounds and Suggestions of it were true, and duly proved) yet that there is no such Necessity.

In order to discover whether there be any such Necessity or not, I shall consider the End proposed by this Bill, and then weigh the Means whereby 'tis hoped to attain that End, and whether this Bill be a Means necessary or convenient to attain it.

The End, I hope, is the Security of the Government, and the Execution of Justice, and it ought to be pursued by all regular and lawful Means; and therefore, before I speak particularly to the Crimes supposed in this Bill, or the Proofs which have been offer'd to make them out; I shall beg Leave to say something as to the Manner and Method of this Proceeding. Not that I shall presume to question your Lordships Power in such Cases: But, as on the one hand, we must admit your Lordships may, and have in some Cases exerted your Legislative Capacity, in declaring That a Crime which was not so before, or by inflicting particular or extraordinary Punishment on common and ordinary Crimes: Yet, on the other hand, till that is done, I hope I am at Liberty freely to represent the Inconveniency, the Injustice, and the Imprudence of making such a Declaration, or of passing such a Law, in the Case now before you. If it shou'd become a Law, his

Lordship must dispute it no longer, but submit to it as just, whatever Hardships he may, in the Retirement of his own Heart, conceive introduced upon him, by it. But, Thanks be to God, this is yet no Law, and that I am at full Liberty to represent the Injustice and the Unreasonableness of this Bill, and to say, this is not a proper Occasion that needs or calls upon your Lordships to exert your Legislative Power.

I might here enlarge upon the Injustice of all Laws made *ex post facto*, and for one particular Case or Person, and no other; that they are against the Common Law, and the Common Right, which every one is entitled to, in the Place or Community where he lives; because Laws, in their Nature, ought to be Rules for the general Order, and Good of Society; and natural Justice would surely in all such Cases stop the Precipitancy of your Lordships Resolution, by this Question, Against what Law hath he transgress'd? If he hath transgress'd any Publick known Law, he is undoubtedly subject to undergo the Pains or Penalties enacted by it, when the Proof is duly and fully made which that Law requires. But if there is no such Law yet in being, or if there is no such Proof as that Law requires to suppose him guilty, will your Lordships introduce a new Law, or a new Sort of Proof to make him so? If these Methods are to be taken, the most innocent Man is not safe, and the wisest Man cannot judge what is an Offence, or in what Degree; what Proof is necessary for his Defence, nor how he is to be try'd. And in vain does the Legislature every Session provide Laws, if a particular Law or a particular Proof is still to be made for every particular Purpose, not only contrary to the Tenor of all the former; but such, as is not to be a Rule or Law in any other future Case whatsoever.

Thus much I am sure may be justly urged, in any Place or Judicature in the World, against all such Laws in general; but much more as we are *Englishmen*, as we have Laws, which my Lord Bacon calls wise and just, that give to God, that give to *Cesar*, that give the Subject, that which belongeth to them. Not like those of other Countries, imposed upon the Subject at the Will of the Prince, before Probation or Tryal, whether they are fit and convenient for the Genius of the People; nor the Production of one Man, or of one Parliament in any one Age, but the Wisdom and Experience of many Generations.

And I am sure one of the greatest Excellencies of this Law, beyond that of other Nations, has been always esteem'd the common and ordinary Method of Tryal. It has been always accounted the Birth-right of an *English* Subject to be try'd *per Pares*, according to the known Course of the Law.

And therefore, the better to shew the Difference, and to evince the Hardship of this extraordinary Proceeding, I shall a little consider the Nature of the ordinary Tryal; and tho' I might do this in the Language of *Magna Charta*, and of many eminent ancient Writers of the Law, I rather chuse my Lord Chief Justice *Hales*, that great and good Man, whose happy Moderation between the Prerogatives of the Crown, and the just Liberties of the Subject, can never be remember'd by Posterity, without the deepest Honour. He says it is the best Tryal in the World, and one of the first Principles upon which our Constitution is erected. Here a Man has a legal Exception to any one of his Tryers, if they have any Dependence upon either of the Parties, are prepossess'd or prejudiced before they hear the Evidence. All the Evidence is given openly, in the Presence of the Judge, Jury, Counsel, and Parties; not in private, before a Commissioner or a Clerk, (as in Chancery, or by the Civil Law) where oftentimes a Witness delivers that, which he will be ashamed to testify *ore tenus*, and wherein a crafty Clerk will oftentimes make a Witness speak what he really never meant, by dressing up his Evidence in his own Terms, Phrases, and Expressions. Or a Man may depose in Writing, what the Fear of being falsified, or perhaps a better Recollection wou'd not let him adhere to in open Court, where he has an Opportunity to correct, amend, or explain his Testimony.

Besides this, (says that Learned Judge) a Jury must all agree in their Verdict, and are not to be concluded by a Majority; and therefore, tho' in some Cases, the Law don't positively require two, nor one Witness, *viva voce*; yet the Credit of a Verdict is great, where twelve Men on their Oaths unanimously agree.

The Counsel on the other side may be apt to reply upon me, with the frequent Abuses and Corruptions of Juries. My Lords, I do agree, that may happen to be the Case, or it may happen that one more knowing or over-bearing Man among them, may sometimes govern all the rest. But, if the same may happen, and often does, in every Society or Number of Men, and the best regulated Bodies in the World, surely that can never be a Reason to deprive a Man of his Common Right, and to lay aside a most valuable Institution.

History of the Law, cap. 12.

I am afraid, My Lords, this little has been too much upon a Point that so little needs it; but the Love of one's Country, and its ancient legal Constitution is an honest Prejudice, which every one is apt to indulge; and the Advantage of this Privilege, every one that hears me, (I doubt not) is in his Heart sufficiently convinced of, and would boldly insist on it as his Birth-Right in any Case of his own, where his own Property, his Reputation, his Life, or his own Liberty was in the least concerned.

It is urged by the Counsel for the Bill, and indeed by the Bill itself, that this is an Extraordinary Case, and requires an Extraordinary Remedy, where the Offender has taken Care, by subtle Contrivances, to keep out of the Verge of the Law, and the Reach of all ordinary Proceedings. But if such a cruel artificial Suggestion be allow'd to be a good Reason to deprive a Man of the Benefit of the Law, no Man's Life or Liberty is safe. The same may be suggested of every Offender, and in every Offence: That a Man endeavours to evade the Punishment of the Law. The same may be said with more Justice of every one that pleads Not Guilty, and insists on his Tryal, that he endeavours to evade the Law, because such an Accusation or such an Indictment is found against him. And yet the most rigid Casuist never yet maintained, but that any Man (tho' he knew himself to be a most guilty Criminal) might plead Not Guilty, and insist on his Tryal.

But if this cruel Artifice is to prevail, and this should be a Reason to exert such an extraordinary Proceeding: Wo! be to all Men of Sense and Ingenuity. Nay, My Lords, if such a Notion is to take Place, the Bishop is in a much worse Condition, than if *Neyno* were alive, or any other Witness would have deposed, *viva voce* against him, all they would have had them. For even then, his Accusation or Indictment must have been found upon the Oaths of Twelve Men at least, he would have had his legal Tryal, and his Challenges. This I say upon a Supposition that the Gentlemen of the other side may not allow his Lordship to be a Peer of the Realm; but if they do allow his Right of Peerage before Your Lordships Bar, and consequently that he is intitled to a Tryal by his Peers, yet still he would have had his legal Exceptions to the Testimony of the Witnesses; there must have been Two positive Witnesses to the same Overt Act; and his Accusation must have been found by Twelve Men at least upon their Oaths; and, after all, if his Lordship should have been found Guilty, he might move in Arrest of Judgment. All which Benefits he is now utterly deprived of, by this Method of Proceeding.

We shall be told (I doubt not) by the Counsel for the Bill, that your Lordships sit now in a Judicial Capacity; that you are Judges of the Fact, as well as of the Law. No Man will doubt, but your Lordships have a Judicial Capacity, and have at all times most worthily exercised it; but yet I must beg leave to doubt, whether your Lordships are now properly acting in that Capacity or not? You have a Power, 'tis true, in this Method of Proceeding to condemn this Reverend Prelate, if Guilty; but not to save and acquit, if you are ever so well satisfy'd of his Innocency; and whether it be your Lordships Pleasure to pass or reject this Bill, I desire to know of the Learned Counsel, whether it may be pleaded in Bar of a Prosecution in the Courts below, that he was *auterfois acquit*, or *auterfois convict* before your Lordships; or whether this Proceeding by Bill might be pleaded in Bar, even of an Impeachment for the very same Treasons, or whether your Lordships Resolution on this Bill (whatever it be) would be any legal *Estoppel* to any other Bill in a future Session. No, My Lords, I humbly apprehend, it would not be a good Bar or a legal Plea, either at Common Law, or according to any Rule or Usage of Parliaments; and therefore we hope your Lordships will not do that, which after all cannot be a compleat or a final Judgment, and by that Means draw this Reverend Prelate into the Danger of a double Tryal. Which, I am sure, is not only contrary to the Rules of Law, but also of Natural Justice. I have the more Countenance in saying this, not only from *Hambden's Case*, but from the known Case of *Fitzharris*, who pleaded this very Matter to the Jurisdiction of the Court of *King's-Bench*, that he was Impeach'd for the same Crime by the Commons of *England*; but it was the Opinion of that Court, with the Advice of all the Judges, that he might, notwithstanding, be try'd there; and in fact, was try'd and condemn'd by the Court of *King's-Bench*, tho' the Impeachment was still depending before your Lordships House.

But if your Lordships are resolved to proceed in your *Legislative Capacity*, and My Lord Bishop must, after all, be in Danger of the ordinary Method of Tryal;

yet suffer me to say what has been done, in former Times, by former Parliaments, on the like Bills; and how light soever other Authorities may seem, we hope your Lordships will have some Regard to your own Usage and Resolutions.

There have been too many Instances, I confess, My Lords; but those, that can be in any Degree justify'd, may be reduced to these few. They are such as pass'd against Persons Dead, or fled from Justice, and did not render themselves by the time appointed; or they have pass'd against such as were in actual Rebellion, in direct Opposition to all Methods of Tryal, and in Defiance to all Courts of Justice; or against such whose Treasons were flagrant and undeniable, but their Persons above the Reach of Inferior Courts and Commissions. Those few Sacrifices to the Heat and Necessity of the Times have been most of them revers'd with Infamy and Detestation, when Men were Cool, and at Liberty to hearken to the Voice of Law and Reason, and began to consider they had only prepared Shackles for themselves. Those few melancholy Instances, procured without due Tryal by an Excess of Prerogative, of Persons that have been forth-coming, principally because it was the Will of a Prince, are not to be mention'd without Horror and Detestation. Such as those, says my Lord Coke, *auserat oblivio si potest, si non, utique tegat silentium*. Let such gross Breaches and Violations of the sacred and unalterable Rules of Justice be forgot, if it be possible; or at least draw a Veil over them, and let them be buried in perpetual Silence.

4 Inst. 37.

Tryal in 8vo.

1 Rushw.

But in all sober regular Times, a free Tryal in the ordinary Course of Law has seldom been denied, even where the Facts have been so notorious as (one would think) almost to need no Tryal, and so Evident as to need no Proof; as the Regicides, except such as fled from Justice, were admitted to Tryal, no less than Twenty Nine before one Commission of Oyer, and every one heard with Patience in the ordinary Course. Even *Felton*, that stabb'd a Premier Minister in the Execution of a High Commission, tho' he confess'd the Fact, both before the Council and Court of *King's Bench*, and justify'd it as a Publick Service to the Nation, in the most daring and impious Manner, was brought to Tryal, without superseding any of the ordinary Methods and Circumstances of Justice. Indeed where some flagrant Crimes have been legally prov'd and determin'd in the Courts below, Parliaments have sometimes thought fit to add to or heighten the Degrees of Punishments. It was so resolved in the Case of the Gunpowder Plotters, 5 November, that they were at first to be try'd at Law, and then the Parliament, (if need be) to add a Confirmation to it. Nay, that Resolution went farther; it says they were not competent Judges of it, before it was found in the Courts below.

I might mention the Opinion of Judge *Dodderidge*, the Mirror of Justice, Lord Chief Baron *Atkins*, &c. who says the Parliament is a Supream Court of Oyer, and that the proper Subject of their Oyer is such Offences for which Right cannot otherwise be had, and to deal with Delinquents too high for the ordinary Courts. And, as I am before your Lordships Bar, I am very proper to mention the Resolution of your Lordships Predecessors, in the Case of *Fitzharris*, who (as I before mention'd) was impeach'd by the Commons of High Treason; they refused to take him out of the Hands of ordinary Justice, and directed him to be proceeded against according to the Course of the Common Law.

And what Opinion subsequent Parliaments have had, of my Lord *Sirafford's* Bill of Attainder, best appears from the Words of the Act of Reversal, by ordering all the Records and Proceedings relating to it to be cancell'd and destroy'd, that no Remains of so evil and unjust a Precedent might be visible in after Ages, or brought into Example to any one's Prejudice. But even in that detestable Instance, such Informations and Evidence were not admitted, the Witnesses were all examin'd, *viva voce*, upon Oath, and he was first adjudged Guilty, by way of Impeachment at the Bar of the Lords, before there was any Order for a Bill. The very same Method was observ'd in the Case of Archbishop *Laud*, and Articles fully proved against him, as they thought. If it had not been so, even that House of Commons, as bad as they were, and as thirsty as they were after the Blood of those Noble Persons, probably would not have order'd those Bills. But yet this latter Instance of Arch-Bishop *Laud*, never had the Royal Assent, and 'tis well known in History, what desperate Measures were made use of to induce the Lords to pass it; and at last I think there were but Seven of your Lordships whole House, that were present when it was pass'd. But if this Bill should pass, we must no longer blame and condemn those Instances; for this will, in effect,

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re-enact them, and many others; which the Wisdom of former Parliaments have revers'd with Marks of Infamy and Detestation.

How much more is there to be said of Sir John Fenwick's Case? He had been Indicted upon the Evidence of two positive Witnesses: There had been several preceding Trials at Law, by which it manifestly appear'd that he was equally concern'd with those that were found Guilty. Sir John Fenwick had likewise withdrawn himself from Justice, and was retaken; (a Circumstance always urg'd as a strong Presumption of Guilt.) He had protracted his Trial by Offers of Discovery, the Reason of which afterwards appeared to be, that one of the King's Witnesses might withdraw himself beyond Sea; and although that Witness was gone, yet his Evidence not only remained in Writing sign'd, and upon Oath, but was attested and confirm'd by some of the Grand-Jury themselves that found the Bill, and by others of the Petty-Jury, before whom that Witness had given the very same Evidence. There was a Proof likewise that he had attempted to corrupt the remaining Witness, as well as some of the Jury. These were Circumstances upon which that Case was founded; no Man can say, but there was a reasonable Evidence, tho' not strictly legal; one full and positive Witness, and many strong undeniable Circumstances; and yet the Opposition, which that had in both Houses, was very great; whether the Reasons that prevail'd for the passing of it, were sufficient, becomes me not to enquire. Since it is still a Law, I must presume them just.

But is there any thing, my Lords, like that, in the Case now before your Lordships? Has there been any Attempt to withdraw from Justice? and yet that Honourable Committee have been pleas'd to observe, his Lordship had Notice that he was to be apprehended some considerable time before. Has there been any preceding Trial, in which my Lord Bishop's Name was mention'd as an Agent, much less, (as this Bill suggests) a principal Manager and Director in the Conspiracy! Or, in that one Trial which hath been, has any thing appeared to derive the least Suspicion of Guilt upon him? Can any one say, he has used any Methods or Artifices to avoid or protract his Trial in the ordinary Course of Law? Has he not on the contrary (and as one of the strongest Proofs and Convictions of Innocency) sought and petition'd to be tried? Yes, my Lords, he has applied in all Courts, and in all Places, in the most earnest and legal Manner to be brought to Trial? Has this Reverend Prelate used any indirect Measures to corrupt or withdraw a Witness? And yet Mr. Kelly, (who is the only Person suppos'd capable of testifying against him) 'tis well known, had his full Liberty, even after his Lordship's Apprehension, but wou'd not hazard his Recognizance by one Day's Non-appearance. No, my Lords, nothing of that kind has been attempted to be prov'd, nor so much as insinuated in this Case; nor is there here before your Lordships any one positive Witness of any kind: Nor is there the Sanction of any one Oath here, or any where else, in any one material Point against his Lordship; what need therefore, or what Reason can there be for this Bill? Surely your Lordships will never pronounce a Judgment that shall affect any Man's Life, Liberty, or Fortune, without some Oath, and on Circumstances so widely different in every respect from those of Sir John Fenwick.

And if this Case bears no Proportion nor Similitude with that of Sir John Fenwick; I am sure it has much less, or rather none at all, with any of those before mention'd. For we hope, after so long and full a Discovery of the Conspiracy, and those many just Methods of Preparation against it, the Danger cannot now be so great or cogent, as to require so precipitate a Resolution. His Person, your Lordships see, is safe and forth-coming, and the Courts of Law in their usual and open Course; and at this time filled with such learned and resolute Judges and Ministers of Justice, that they are equal and able to deal with the most bold and daring Offender.

There can be less Reason therefore, none at all we hope, for your Lordships at this Time to exert such an extraordinary Method of proceeding.

But there is this further Objection against proceeding by Bill, That it makes not only your Lordships pronounce Judgment against one of your own Members, and a very terrible one too; but it makes the King himself, without hearing one Word of the Defence, in Person, pronounce a Judgment upon his Subject, which his own gracious Temper must be averse to; which the Common Law therefore has wisely left to be pronounced by his Justices, even in those

those Courts, where he is always supposed to be present. But in this Instance, there is something, which must be still more ungrateful to him; in that it is to exclude a Branch of Prerogative which his Majesty most delights in, and it must be some Surprize to every good Subject to find His Royal Judgment so highly mistrusted.

There is another Thing, which I persuade myself, your Lordships will fully consider; that if this Method of proceeding by Bill be encourag'd and grow familiar, it will put an End to one considerable Branch of Judicature, which your Lordships were heretofore so justly jealous of, as not to admit at any time the least Competition. The Lower House will hardly care to appear any more before your Lordships as Accusers or Prosecutors, when they can so easily partake in your Judicial Capacity. And every such Bill, (especially against a Member of this House) is a direct Infringement and Diminution of that high and valuable Privilege; and will open a Door to some other Mischiefs to the Peerage; which I had much rather your Lordships wou'd suggest to yourselves, than I express. It has been always doubted without Doors, whether your Lordships could begin such a Bill against a Commoner; but I think it may be more justly doubted whether the Lower House can begin such a Bill against any one of your Lordships; and, if this Bill should have no other Consequence, it will establish this so far, as to bear no Question hereafter. My Lords, I need not say, how much more proper it would have been, for the Lower House to have left this Matter entire to your Lordships; because it has been so often resolv'd by your Lordships Predecessors, that the *House of Commons* have no Power of Judicature or Coercion against any one, but in Matters concerning that House. Whereas this is a Case of Peerage, the Punishment, and the Exclusion of a Member of this House. There is an Instance on your Lordships Journals, where the Lord *Purbeck* voluntarily surrendred his Title and Dignity of Viscount to the King by Fine, and yet your Lordships unanimously revers'd that Judgment, and declared, that no Place could judge of, or intermeddle with Dignities or Rights of Peerage, but your Lordships own House.

And those my Lords of that Reverend Bench will surely consider what a fatal Blow this Bill will give to the Discipline and Polity of the Church of *England*. They have more than ordinary Reason to be jealous of encreasing such Precedents, and of introducing Methods of depriving Bishops and Deans, hardly known to former Ages. The ancient Canons have already prescrib'd Methods of judging, censuring, and deposing Bishops, and the Cases when and where those Methods are fit to be exercis'd. I don't say the Parliament cannot do this, or any thing else which they think proper; but the Metropolitan, Their Lordships know, is intrusted with this Power over his Suffragans, or a Provincial Synod. And 'tis plain the Law of *England* takes notice of no other Power, that can regularly deprive. For to mention but this Instance, If an Issue should be join'd, whether a Bishop be deprived or not, the Court, where such Issue should arise, could only write to the Arch-bishop to certify. And to prove this Assertion, I will not name Bishop *Stillingfleet*, or any of those great Ecclesiastical Authorities, (since possibly they may be excepted against, as Persons who have too much Interest in the Case to be impartial) but it is so laid down by my Lord Chief Baron *Atkins*, in his great Argument of Ecclesiastical Commissions, and by my Lord Chief Justice *Holt*, and the Court of *King's-Bench*, in the Case of *Dr. Watson*, Bishop of *St. David's*.

All Precedents, my Lords, will increase; and the Scorn and Contempt of Libertines against your Lordship's sacred Order is too great to drop, or to forget a Precedent so grateful and pleasing to them as this will be. Every one knows the Destruction of the smaller Religious Houses only made way for that of the greater. A Time has been when their Lordship's Predecessors were all excluded and sequestred, and it has been attempted, even since the Restoration, to take away Deans and Chapters. I am far from apprehending any such thing at present, and I hope it will never enter into the Heart of any Man. But, my Lords, I confess I thought as little at this time of such a Bill as is now before you, to deprive a Bishop and Dean at once, not only of all his Dignities and Benefices, but from the Exercise of any Part of his holy Office and Function: And I will say, that if this Bill should pass, and by any of their Lordship's Assent, such a Design will be rendred more easy and familiar, and much more unpitied, by all Mankind.

Give

Give me Leave, my Lords, next to observe, with what Caution and Moderation other Parliaments have proceeded, even in those Cases where they have thought proper to exercise their Legislative Capacity. I pass over the Statute 7 *W. c. 19.* for Imprisonment of Sir *Thomas Coke*, &c. and many other such Cases, which were too great and intricate for the ordinary Course of Law, but yet too low and inconsiderable to enter into this Comparison. But the Statute 8 *W. c. 5.* may be named, I am sure, with that now before you, for the Imprisonment of *Counter*, &c. concern'd in the Assassination Plot, against all whom there was some positive Evidence upon Oath. Tho' the Zeal of that Parliament can never be question'd from an Act so full of Gratitude, and in such strong Terms and Accents of Loyalty to the King, yet they did not at once, and at one single Stroke, cut them off from the Land of the Living, and utterly deprive them of all the Necessaries of Life. The first Step that Parliament took, was to pass an Act for the Detainment of them for the Space of one Year only, not to the Forfeiture and Deprivation of all they were worth, or to the Exclusion of his Majesty's Mercy, but even to leave a discretionary Power of Bailing within that time, to any six of the Privy-Council, if they judged proper. Their further Obstinacy and Impenitency occasioning another Act, 9 *W. 4.* to detain them a Year longer, it was still under the same Exception. At the End of that Term, another Act was made, empowering the King to detain them during his Pleasure, 10 *W. 11.* After these, two other Acts passed, empowering the late Queen and his present Majesty to detain them. What the particular Reason of these Alterations were, I cannot take upon me to determine, because the Acts themselves are wholly silent; but, my Lords, such were the prudent and moderate Steps taken by former Parliaments, even in that bold and wicked Conspiracy.

I may also justly take Notice of the Prudence and Clemency of the last Parliament, when there was so loud and so general a Cry for Justice, and when the Necessity of the Time seemed to require a more speedy and extraordinary Degree of Punishment than the Common Law was acquainted with; but with what Difficulty, with what slow Paces, and with how many tender Circumstances that Bill pass'd? Your Lordships will easily imagine that the Persons I here speak of are the late Directors of the *South-Sea Company*.

It would ill become me (my Lords) if I had Inclination, to insult the Distresses, or to aggravate any of those Gentlemen's Misfortunes; but the Service of the Reverend Prelate now under Consideration, requires me just to mention what a State of Confusion they had reduced the Kingdom to; how many Thousands have felt, and still feel the pernicious Effects of that Scheme. Tho' their Crimes had no particular Appellation, or determinate Punishment in our Law, yet the Civil, and the Laws of other Countries could have told us, That *Crimen Peculatus*, the Robbery of the Publick Money, was such an infamous Transgression, that the Punishment of it was Death, both in the Principal and Accessaries. How different and how mild was the Punishment inflicted by the late Parliament, in Comparison of that, I need not mention; and every one knows, how tenderly and sparingly that Law has since been executed upon them, and how much they still enjoy of the Spoils and Plunders of the Nation.

Let us not then follow every Precedent that has been, but the just and prudent Precedents of moderate Times, and of good and peaceable Reigns. Let us not be ambitious to surpass the Proceedings of violent and arbitrary Men, which we or our Posterity may have Cause to repent of hereafter; but let us imitate such only as are agreeable to the Law and Constitution, such as are grounded upon true Reason, and the Principles of exact Justice.

HAVING thus spoken as to the Method of these Proceedings in general, and shown (in some measure, I hope) that they are contrary to the publick Wisdom, contrary to the known Rules of Law, and the common Right of the Subject, I shall, with your Lordship's Favour, next examine the Foundations and Suggestions of this particular Bill. As for those general Matters and Allegations with which it is introduced, and upon which the Counsel for the Bill have spent so much Time; there is no Necessity, as we conceive, to answer to. We are here before your Lordships only as Counsel for this Reverend

Prelate, one single supposed Conspirator; and it would ill become us in the least to controvert, that there has been a Conspiracy formed and carried on by some Persons Abroad, and by others at home, after it has been so solemnly resolved by both Houses of Parliament. Nor can we deny, but that Mr. *Laver* has been Tried, Convicted, and Attainted of it: But we are yet to seek, how those Things have any Relation to the Case now before your Lordships; or how that unhappy Gentleman's Case comes to be connected and made Part of my Lord Bishop's, as it is by this Bill. We may justly appeal to every one that heard or read that Tryal, whether this Reverend Prelate's Name is so much as mention'd in any one Line of it; whether there are any Grounds to think, from any of that Gentleman's Papers or Examinations, that his Lordship was privy to, or in the least concerned or acquainted with his Person, or his Intentions: And I dare say, his Lordship is as much amazed at the Rashness and Folly of his Schemes, as he detests the Wickedness of them. Notwithstanding which, it is his Misfortune to be charged in this Bill as a principal Actor and Director in the framing and carrying on of those very Schemes and Designs for which that Gentleman has been Convicted. And as to the Cyphers and Papers of *Plunket*, I am as much at a Loss to imagine, upon what Grounds they should be given in Evidence against the Bishop, since 'tis not so much as suggested in the Bill, nor is there any thing throughout the *Report* or *Appendix*, that in the least Charges his Lordship with any Intercourse or Correspondence with him.

It is strange, my Lords, that Persons Thoughts and Intentions, so widely distant in all other Respects, should yet center in such unnatural Projects, and wild Undertakings, without some previous Discourse, some Consultations, or Acquaintance one with the other; and yet as strange and unaccountable as it is, this Reverend Prelate is charged in the very same manner by this Bill, with consulting and endeavouring to raise an Insurrection, to procure a Foreign Force to invade the Kingdom, and Corresponding with the Pretender and Persons employ'd by him, knowing them to be so employ'd. And if these Facts, my Lords, had been duly and legally proved, I should have very little to say in his Defence, but humbly intreat the Mercy and Compassion of this Honourable House; for they are Offences in themselves so great, on the one hand not capable of Aggravation, nor on the other of Excuse or Diminution, by any thing I can say. But if the Facts have not been proved in the Whole nor in Part, the bare Affirmation or Allegation of them, is only *Brutum fulmen*, and does his Lordship no more Harm, than any other innocent Man, whose Misfortune it is to fall under an unjust Accusation. Or if those Circumstances which have been proved, are not Criminal in themselves, they shall not, we hope, by Inferences and Deductions, be heightened into Crimes, and the Number or Complication of them shall never make them exceed their Nature. And, my Lords, we hope, that notwithstanding all that has been affirmed, alledged, or proved, this Reverend Prelate can still say, not only in the Form of Law, but boldly and with a safe Conscience, and upon an impartial and serious Recollection say, That he is Not Guilty of any one of the Charges contained in the Bill. That he is not conscious to himself of any one Treasonable or Irreverent Expression, or of any one Degree of Offence committed by him, with respect to any of those Charges. He can still say, That he has not acted in direct Violation of his Oaths and Obligations, nor to the Scandal of Religion or his Holy Function. I am sure, my Lords, I should not take upon me to say this for his Lordship, or any Man alive, unless I thought we had a full and positive Answer to every thing that has been said, unless I was verily persuaded we had a sufficient and a legal Proof to encounter all that has been offered on the other Side; or unless my Instructions told me, that many Things in the Course of their Evidence are utterly false and groundless; false I say, as we shall prove (if my Instructions are true) by the fullest Proof, and the most satisfactory Evidence that is possible in the Case; by such Arguments and Reasonings, as we think are clear and undeniable, by some Witnesses we never saw nor heard of before, consequently the more credible and impartial; by others, whom I am sure we had no Opportunity to lead or instruct; and all (as I am informed) glad, that it is consistent with the Rules of your Lordships House, to receive their Testimony upon Oath. In short, every Circum-

stance,

stance, every Part of the Evidence produced against us, your Lordships, in the End, we hope, will find, turn strongly for us.

There is one thing which I take for granted, from the Nature of the Evidence that has been offer'd, That it is admitted as fully by the Counsel for the Bill (as if they had said so in express Terms) that there is no legal Evidence against his Lordship in all they have offer'd; or else this extraordinary Method of Proceeding, and this new sort of Evidence had never been set up. Nay, I am sure, it is a sort of Force upon those Learned Gentlemen, so well versed in Methods and Notions of Law, to maintain so many gross Paradoxes, which have not the least Colour of legal, or even a reasonable Evidence, and would never be allowed, they well know, in any Court of Law or Equity. And tho' your Lordships have been pleased to permit those Papers and Letters to be read, your Lordships did not (as I apprehend) finally declare or determine them to be Evidence; but were willing to hear all Things, and afterwards judge how far it was reasonable or fitting to admit them as Ingredients in your Lordships Judgments. And whatever Opinion your Lordships might be of on the two former Bills, as we are Strangers to them, so we hope we are not precluded from offering any thing farther, why they ought not to be allowed in this Case. If it be your Lordships Pleasure at last to adhere to that Opinion, or to resolve the like in this Case, we must submit.

If there is any thing certain in Law, or agreeable to Reason, it is this, That in all Criminal Charges, the Evidence ought to be clear and positive; and that the higher and more heinous the Nature of the Charge is, the more clear and undeniable the Evidence ought to be by which a Man is convicted. Now, I beseech your Lordships to consider at one View (as far as it is possible in such various and perplex'd Facts) the Methods made use of to prove his Lordship Guilty, and what they have offer'd to your Lordships under the Name of Evidence. Where Words have been capable, and sometimes where they have not been capable, of two Senses, an arbitrary and invidious Interpretation has been put upon them. Where Words have been plain and proper for the Occasion, and which considered separately by themselves, it was impossible to put a Criminal Gloss upon, the Writer is supposed to have some mysterious Meaning or double Entendre, or else they are complicated and thrown together with those which will infer some Criminal Meaning. In other Letters the Names and Words relative to Men, are supposed to be used for those of Women, and the proper and usual Appellation of Women, for those of Men; and because one fictitious Name will not answer all they would have it, the Names are often shifted, one and the same Person is supposed to pass under seven or eight different Denominations; and often two or three Names in the same Letter, within the Compass of two Lines one to the other, are urged to stand for the same Person. Some Letters which are writ of another, and speaking in direct Terms of a third Person, they would have to mean the Writer himself, tho' as often without any Name, Date, Subscription or Superscription at all. Books of Accompt, Manuscripts, and common Mercantile Terms, which seem proper for the Person and the Occasion of the Correspondence; and the Name of Stocks, which every one knows the true Meaning of, and carries all the Appearance of Reality, are very particular and exact in the current Prices at that time, by a new kind of Metaphor are to be taken in an ill Sense. Others, which are only to be inform'd of the Distemper of a Friend, the Variations which happen in it, and the Opinion of Doctors upon it, by a strange and arbitrary Construction are applied to explain very different Purposes; and as if they were suspicious even of their own Suspicions, and distrustful of these Explanations, they call in Aid several disjointed Fragments, Extracts, and Scraps of Papers, which no Man but themselves can tell what to make of; and when there happen to be some Words which cannot be reconciled with such a Construction, or the Uses which they would make of them, they are totally omitted, and we are told they are not material, or not yet decypher'd, or not legible in the Original, but your Lordships and the World must intend them to mean something Criminal.

My Lords, if such Foreign Suppositions, Glosses, and Intendments; such unnatural Constructions, false Inferences and Innuendo's, are to be admitted

as Evidence, and deserve the Name of Proof, I must confess they have given you some. If the Whimfies and Conjectures of Decyphers, the Hearfays and Reports of third, fourth, and fifth Persons are to take place in your Judicial Proceedings, instead of that plain, honest, and positive Proof, which the Law requires; or if the Number of Facts and the Variety of Circumstances could make them alter or exceed their Nature, I must confess, they have offered some Things worthy of your Lordships Consideration.

But if it were your Lordships Pleasure to construe Things according to the most natural plain Sense and Import of the Words, as others would have understood them, and in such a Sense as the Writer probably meant them, or in that just manner which your Lordships have hitherto done on criminal Prosecutions, no one can say they have shewn one Degree of legal or reasonable Evidence to prove any one Suggestion in the Bill. This I must humbly assert, and I think no one can disprove my Assertion.

Thus far in general of the Proofs that have been offered; but I shall, under your Lordships Favour, speak now more particularly to them, and shall be so far from abridging or sliding over any thing that has been said, that I am willing every thing those learned Gentlemen for the Bill have been pleased to offer, or that Honourable Committee have observed in their Report, should have its full Weight, and be put in the strongest Light against us.

It has been observed that there were three several Methods and Times fixed for the Execution of this intended Conspiracy.

The first was to have procured a regular Body of foreign Forces to invade the Kingdom at the time of the late Elections (which were from the middle of *March* to the middle of *April* 1722.)

But have they shew'd your Lordships any Evidence, or even one Passage in the Report of that Honourable Committee, that particularly charges his Lordship with being privy to any one of these three Designs thus generally and roundly affirmed? He is not charg'd with being privy to either of the three Memorials to the Regent for Forces. The only Passage that can be pretended to contain any Imputation of that kind, is in the Letter sign'd 1387 to *Jackson*, which, they say, there is reason to believe was from my Lord Bishop to the Pretender; but this we hope in the Course of our Evidence effectually to disprove.

The second Design was to have made an Attempt at the time it was believed his Majesty would go abroad; but all that is insinuated in relation to his Lordship is contained in two or three obscure Passages relating to one *Jones*, in Letters said to have passed between *Dillon*, or his Secretary, and Mr. *Kelly*; which Passages being something ambiguous, are interpreted in an ill Meaning, by Hearfays from *Neyno* and *Pancier*, and *Plunker's* Cypher; but cannot, without the greatest Absurdity, be thought to relate to his Lordship.

Rep. p. 47, 8.
App. E. 43, 4.
C. 51.

Two of these Passages relate to Remittances of Money, which they insinuate the Bishop was to furnish; but it amounts in the Whole to no more than the bare Hearsay of one Man, and an arbitrary Interpretation of some Expressions in the Letters of two others (to either of which his Lordship has not in the least been prov'd privy) and the Whole depends upon a Supposition that *Jones* here and elsewhere in the Correspondence means him; which depends again upon another Supposition, that the Bishop dictated those three Letters of the 20th of *April*, one of which is signed *Jones*; a Supposition which we hope likewise to prove absolutely false, and by that means shake the Foundation of the whole Charge.

Rep. p. 47.
App. D. 17.

The other Passage is in a Letter from *Dillon's* Secretary to *Kelly*, about *Jones's* fitting and providing himself with Saddles, which by the same Methods is explained to mean Soldiers and Regiments, which his Lordship is supposed to have undertaken to procure; and if the Words are to be taken in that Sense, and applied to him, he must likewise be supposed to have undertaken to be at the Head of them; which, considering his Lordship's Function, Age, and Infirmities, is so absurd and ridiculous, that instead of spending more of your Lordships Time in answering of it, I shall only make use of it hereafter as one Instance (among many others) to shew, how much they are mistaken in affirming, that wherever *Jones* is named, his Lordship is to be understood.

The

The third and last Design, tho' I must confess the most enormous, if it were true, because part of it was the Seizure of his Majesty's Person, was to have been put in Execution at the breaking up of the Camp. But, I am sure, there is not one the least Hint throughout all this voluminous Affair, that his Lordship was concern'd or privy to that.

And therefore 'tis surprizing to think upon what Grounds his Lordship can be (as he is in the Preamble of the Bill) charg'd with having been deeply concern'd in forming and directing this Conspiracy; which, as your Lordships have heard, consisted of those three several Designs. The Counsel, indeed, for the Bill have endeavour'd by divers Methods and Reasonings, by some little Circumstances, and seeming Probabilities, to charge upon his Lordship in general such a Correspondence: And they may all be reduc'd to these four Heads:

1. Hearsays,
2. The three Letters said to be dictated by his Lordship, and wrote by *Kelly* to Lord *Mar*, *Dillon*, and the Pretender.
3. Two Letters, said to be wrote to the Bishop.
4. The Co-incidences of Circumstances, Times, and Names, in the intercepted Correspondence, to induce a Belief of the before-mention'd Hearsays, and supposed Facts.

To all which I shall endeavour to give some Answers.

But before I enter upon these Particulars, I shall beg Leave to observe to your Lordships, that if such Evidence is to be countenanced, it will be in the Power of any two Men, the one in *England*, the other beyond Sea, getting an Account of the Circumstances and Motions of a third Person, by an artificial intercepted Correspondence, to raise what Suspicions of him they please; and yet he be all the while Innocent and Ignorant of what is doing. Whether that is the Case here, I shall afterwards submit to your Lordships Judgments.

But it is very remarkable, that in all the intercepted Correspondence to and fro, there are no Footsteps or Descriptions which any ways point out to, or of whom they are written, but those alone which are supposed to relate to his Lordship; and in them, as the Counsel observe, Things are said and done in such a Manner, and with such particular Circumstances, as lead directly to him, and him only. And this being so contrary to the Caution and Reserve practised in all other Instances, carries in it some manifest Marks of Fraud and Contrivance.

This Remark I humbly apprehend to be the stronger, because there has been no Proof of any particular Meetings or Consultations with other Persons, towards carrying on these Designs. And how a Man can conspire with himself, I know not, except that it is barely alledg'd he was a Member of the *Burford Club*, the Falsity of which Assertion that Honourable Committee themselves seem so sensible of, and by that Indulgence and Enlargement which one of those Noble Persons (tho' said to be the Chief of them) has since met with, is now so well understood, as to need no manner of Refutation.

I may also as justly observe, that there is no one Witness against this Reverend Prelate of any one criminal Act or Expression, from the Time of his Majesty's Accession to the Throne, tho' one of the Counsel (as your Lordships may remember) was very particular about the Manner of his passing of the 10th of *June*, which the Coachman gave them an Account of for four Years together; and (though all his Papers were seiz'd) not one Letter, or Paper, under his own Hand, produced of a criminal Nature, or pretended to have been seen or intercepted. Not any one Letter intercepted that is pretended to have been written to him, much less any prov'd to have been receiv'd by him, the Matter of which appears to be Treasonable, or any ways Criminal. My Lords, I must own a great Consequence is drawn by that Honourable Committee, because a great Quantity of Letters and Papers were found dated before the Year 1712. This very Objection was made in the Accusation of his Lordship's worthy Predecessor, and a slight Answer satisfy'd his Examinants; and the plain Reason is, that his Lordship at that Time had a settled Correspondence with many eminent Men on Matters of Learning, which he esteem'd so valuable as to preserve; but since the finishing of those Controversies, he had less occasion to write, and his Lordship's Merits having call'd him up to a more high and busy Station, he had less Opportunity to write; and he that writes little, will receive but little. From that Year therefore (they justly observe) few of any Consequence were found, and even those few, (if no

other than what are printed, and as yet produc'd) we beg Leave to say, are of no Consequence at all, to support the Inference drawn from them.

The first, I think, is from a great Lady; but so general and uncertain, that it does by no means warrant the Conclusion drawn from it; for it does not so much as appear to have been a Letter, or what it was that was enclos'd. And I beseech your Lordships, what more can be inferr'd from Captain *Halsted's* Letter, the Contents of which is no more, than that a Neighbour, as Captain *Halsted* was to the Bishop, desires Leave to Dine with his Lordship on a *Thursday*, which was his publick Day, in Company of 20 other People? I must confess they have laid a Stress upon the Character of the Man in their Opening; but nothing more has been prov'd, than that he was in a Ship by some Name different from his own. Another Letter that was said to be found among his Lordship's Papers, was that directed to *Dubois*. But this (my Lords) I shall beg Leave to reserve for a more proper Occasion.

I shall now consider the four several Charges against the Bishop: And the First arises from *Neyno* and *Pancier's* Informations, all mere Hearsays; some from Living, and some from a dead Person; but positively and expressly denied by the living Persons, from whom such Informations are supposed to have come.

Report
10. 35.
Append.
D. 1.

All *Pancier's* Informations say, relating to this Reverend Prelate, is, That one *Skeen* told him, that the Bishop of *Rocheſter* had the principal Direction of the Conspiracy; and that 200000 *l.* had been rais'd and put into his Management. This *Skeen*, it seems, is still in Custody, and your Lordships will hear how far he will support this Charge.

Tho' the very Accusation it self we beg leave to call Absurd and Incredible; that such a Sum of Money as 200000 *l.* could be rais'd and deposited in one Man's Hands, and not yet traced up to some of the Contributors, or to the Hand where it was deposited, especially when it is charged upon a Person not used to deal in Merchandizes, or Remittances. Though the Counsel for the Bill have slid over this, yet being often repeated in the Report, as if there had been some Weight in it, I thought my self oblig'd to take Notice of it; tho' it is so incredible, I confess, that it is scarce worth removing.

State
Tryals.

E. 7.

Of *Neyno's* Informations, your Lordships may observe there are Four, but none of them sworn to, nor signed; and it was expressly resolved, in Lord *Audley's* Case, by all the Judges of *England*, that no Examination without Oath ought to be read, except of the Party himself that is tried. They are all either of a Date subsequent to his Lordship's Commitment, (and therefore till then thought inconsiderable, and not worth reducing into Writing,) or else they are of no Date at all. One of the Two without a Date appears manifestly to have been taken after he was seiz'd, and brought up from *Deal* in *September*, which sufficiently shews that just Distrust there was at that Time of his Credit; that on the 27th of *September*, was on the Day before he drown'd himself; and both, when he is known to have been under the greatest Terrors and Apprehensions, in that he was not able to make good what appears by the Paper (mark'd E. 11. and found afterwards in his Pocket) to have been undertaken by him, or required of him. It is not said, as to one of his Examinations, before whom it was taken: Another of them, and the only one they now think fit to make Use of, is an Extract only from three other Papers, and said to contain the Substance of them; but the Papers themselves, out of which it was extracted, do no where appear. And there are some Particulars in the Report of that Honourable Committee, which he is said to have confess'd, which do not appear in any one of these Examinations, and are of such a Nature as to affect the Credit of all he said, and (if produc'd) would, we doubt not, in other Respects entirely blast the Credit of his Testimony. And, my Lords, if the Examination of a Man is thus taken to Pieces, the Antecedents and the Consequents left out, Treason (and what not) may be made and inferred from the most innocent Things and Expressions.

E. 9.
E. 10.

Page 38.

But his Examinations, even as they lie in the Appendix, are full of Inconsistencies and Absurdities: Inconsistencies, I mean, not only with *Pancier's*, and the Depositions of other Persons, but even with themselves. For *Pancier* says, little pass'd in Writing in the Conduct of the whole Affair: *Neyno* says, there were many Bundles of Letters that Mr. *Kelly* brought with him from *France*, and which he had seen him write at several Times. But yet they are much more inconsistent with themselves; for instance, *Neyno* says, in his Examination, mark'd E. 7. that he had seen several Letters written by *Kelly* and

and sent to him from *Paris*, and other Parts, but they never contain'd any thing material: And yet in E. 8. he says, that he had seen several Cyphers of *Kelly's*, and seen him make use of them; and that *Kelly* with great Freedom acknowledged they were for carrying on the Correspondence with the Pretender's Agents. Whereas it is utterly incredible that a Man, who had really been so communicative in his Discourse, and of his Cyphers, should yet be so reserv'd as to hide from him any thing material in his Letters. In the very same Examination, (he says,) he was well acquainted with one *Watson*, i. e. the late Earl Marshal, and lay several Nights with him, but after all his Intimacy, at last it comes out, that he did not know really who he was. There are some other Inconsistencies, which have been already taken Notice of by Sir *Constantine*, which I shall not repeat.

But, my Lords, if the Persons and Credit of *Neyno* and *Pancier* were unexceptionable, yet what they say is only Hearsay, or mere Affirmation; and was ever that allow'd as Evidence in any material Point by any Law, or in any Court in the World? 'Tis expressly resolv'd in the Tryals of *Langhorn* and Lord *Russel* to be no Evidence; and it is the first Time it ever receiv'd so much Countenance as to be read in Judicial Proceedings; and I dare say, there is no such Practice in the Court of *Inquisitions* abroad. Even common Fame and Reputation is but of little Weight in any Case that I know of. It may, my Lords, be a sufficient Ground for an Officer of the Peace, in some few Cases to Arrest a Person, or for a vigilant Ministry to make Enquiries, i. e. to Accuse or Apprehend; but was never yet allow'd to be a Guide in Judicial Proceedings, or to Condemn any Man in any Criminal Case whatever. But even when the Commons (in the Case of the Duke of *Buckingham*, 1 Car. 1.) had declar'd, that common Fame was a good Ground of Enquiry, it was complain'd of, and the Commons afterwards receded from it, and proceeded upon the Examination of Witnesses, and other Evidences, and in every Article of their Accusation the particular Facts are express'd. Much less will your Lordships allow the Hearsay of one single Man, and only Extracts of that Hearsay, to be of any Weight, nay, to be of more Weight and Authority now he is dead, than if he were living; for if he were living, and could only depose by Hearsay, no one surely can say it would be admitted as Evidence; but since he is dead, and we have no Opportunity of Cross-examining of him, why ought not his Lordship to have the Advantage of it, as was resolv'd in the Case of the King against *Pain*? or like the known Case of a Man dying in Execution, the Law is satisfied, and his Creditor is without Remedy? And it cannot be deny'd, but if one of our Witnesses had died, and a Person had taken Minutes of what he could say, we should not have had the Benefit of his Testimony; and where there is the same Reason, there ought in Justice to be the same Law and Construction. And yet this is the Foundation and Support of the whole Charge against his Lordship. It is upon this Man's Examination singly that it is affirm'd, among other notorious Untruths, That the Pretender rely'd more upon Advices from the Bishop, than from any other Persons. But this, and whatever else is in them, with Submission to your Lordships, amounts to no more than this, That *Neyno* was heard to say, what he heard *Kelly* say, what *Kelly* must have heard some other Persons say, what they had heard the Pretender say, what neither they, nor any one else, ever had reason to say.

5 Mod.
Rep. 161.

But, my Lords, there is still something more strange in what is now attempted; for the Persons of whom 'tis pretended they heard all this, and into whose Testimony it must all be resolv'd, are now both living, and are so far from supporting what 'tis pretended they have heard from them, that they absolutely deny and contradict every Word of it. One of them has already done it (if my Instructions are true) in the most solemn Manner at your Lordship's Bar, and the other is now ready to do the same. And *Neyno* was so conscious to himself of the Falsity of what he had said, that he lost his Life to avoid the Punishment that might otherwise have fallen on him, (for his Flight, my Lords, can admit of no other Sense or Construction.) He could not apprehend himself in Danger, if what he had said was true; but on the contrary, had reason to expect Rewards, if he could make out the Truth of his Information. Charity forbids me now, my Lords, to say any more of him, unless it be thought requisite to prove the Falsity of his Information by his own free and voluntary Confession, often repeated and confirm'd to Strangers and

and indifferent Persons. And (if my Instructions are true) we have those that will speak most fully to it.

This is the first and the principal Part of their Proof; and if we take away this Foundation, all the mighty Superstructure raised upon it must fall to the Ground, and all their corroborative Proofs and concurrent Circumstances must come to nothing.

The second Head of Accusation against his Lordship, is, from three Letters, supposed to be dictated by him, of the 20th of *April*. The first to *Chivers*, interpreted *Dillon*, sign'd by the Name of *Jones*; the second to *Musgrave*, interpreted *Mar*, sign'd *Illington*; a third to *Jackson*, explain'd to mean the Pretender, sign'd 1378, and sometimes 'tis printed 1387; and therefore which of these two is right I cannot tell.

Before I speak of the Letters themselves, I shall mention one Word as to the Manner of their Conveyance: They are said to be enclos'd in a Packet to one *Gordon* of *Bologn*, in a Letter from *Kelly* himself, sent by the ordinary Post, and sign'd with a Name, which they say he most usually sign'd and went by. This is so improbable, that out of eight or ten Names they are pleased to give him, that he could bethink himself at that Time of no other Name to sign a Letter enclosing three of the utmost Consequence, and is so inconsistent with that Caution and Subtlety all along insinuated in this Correspondence, that it almost needs no Confutation. But yet (if my Instructions are true) Mr. *Gordon*, to whom they are said to have been directed, and the only indifferent Person in the Case, and can be under no sort of Influence from hence, has attested upon his Oath, that there was no such Letter, or Packet, ever came to his Hands.

And supposing these Letters were sent, as they suppose, to the Persons they suppose, and dictated by the Persons they suppose; is there one Passage in them of such a criminal Import, as would be sufficient to found an Indictment at Law? If there is not, they are not to be made Criminal by Arguments, Innuendoes, and Implications. The Case of Sir *Samuel Barnardiston*, already mention'd by Sir *Constance*, is expressly in Print, and the Reason given for the Reversal of that Judgment (as appears by your own Journals) is, because the Information was grounded upon Letters, which in themselves were not Criminal, but made so by Innuendoes, and forc'd Constructions. There is *Crosby's* Case, to the same Purpose, before the Court of *King's-Bench*, in the Year 1695, who was indicted of Treason; and the Overt-Acts, laid in the Indictment, were for inviting the *French* King to invade the Kingdom, and by sending Letters and Instructions, how and where to make the Descent. Though the Court thought his Hand-writing was prov'd, and the Matter of the Papers of a very odd and suspicious Nature, and the *French* King frequently mention'd in them. and the Indictment supposed them to be contriv'd for to invite him over; yet they held it not Treason.

And the chief Thing that gives any Ground of Suspicion, in this Case, is, the Person to whom they are supposed to be directed; but I must submit to your Lordships, that there has been no Proof, that either *Chivers*, and *Musgrave*, or *Jackson*, are the very Persons suppos'd, or that his Lordship was privy to the Writing of one, or the other of them; nor are they capable of Proof, as we hope immediately to make appear.

However, for the present, supposing as they have suppos'd, that *Chivers* and *Musgrave* mean *Dillon* and *Mar*, and that such Letters were wrote to them by his Lordship without any Disguise, (unless the Matter of them, as I before said, were plainly Criminal,) or unless your Lordships will suppose (as they suppose) something Criminal contain'd in the Words not decypher'd, and unless it could have been prov'd, that the Persons writing or dictating these Letters, know them to be the Pretender's Agents, and as such address'd to them; I don't know (my Lords) how it could be construed a Treasonable or a Criminal Correspondence, either within the Letter or Intention of *Stat. 14 W. c. 3.* or any other Law whatsoever.

For though the late Lord *Mar* is an attainted Person, it can't be denied but he is still in many Senses a Subject of *England*, and is no more divested of his natural Allegiance, than a banish'd, or an out-law'd Man; and tho' he appear'd in open Arms and Rebellion against his Majesty, he was not thought so dreadful a Man, as to have a Correspondence with him made

made Treason or Felony ; but that was a peculiar Favour, reserved for this Reverend Prelate and his Friends. My Lords, I would not be understood to mean, as if the most innocent Correspondence with a Person under such Circumstances, was prudent or convenient ; but I think I may affirm, (even from the Clause of this Bill) it would not of it self have been Criminal. But (according to my Instructions) this Reverend Prelate was little known to that Lord, and never had any Friendship or Acquaintance with him while in *England*, and cannot be supposed to have contracted such a Friendship, since he was abroad.

That *Dillon* was an Agent of the Pretender's, nothing appears antecedent to these Letters : Nor did *Mar* at that Time appear to be one of his Agents, when it was so well known (as that Honourable Committee observe) that he was at that Time subsisted by a Pension from the Court of *England*. This Pension, indeed, is said to be stopt last *August* ; but the Letter to him of the 20th of *April* (by whomsoever wrote) was some Months before.

Indeed, if *Jackson* had been proved to mean the Pretender, the writing to him would be High-Treason plainly within the Statute ; but that the Pretender is not, and cannot be understood by that Name, we hope to make appear fully, before we have done, even from the Lights that Honourable Committee have afforded us.

I shall next consider the Nature of the Proofs to induce your Lordships Belief, that these Letters were dictated by my Lord Bishop : And the first they offer, is, Because the Matter of them agrees with his Lordship's Circumstances at that Time ; i. e. his being ill of the Gout, and the approaching Death of his Lady ; which (they say) is morally impossible should suit so exactly to any one Man else. These two Circumstances must be allow'd to be agreeable to those which his Lordship was then under : But one would think (my Lords) they are Circumstances so melancholy in themselves, that they might have been spared, especially considering the little Use or Advantage that can really be made of them : But these Circumstances were no Secrets ; every one that knew his Lordship, must likewise know them ; and whoever wrote these Letters with a Design to have them intercepted, and imputed to him, (as we hope to shew the Case really was) would certainly mention such Matters or Circumstances in them, as might be naturally thought to describe him. Or if they were written without his Knowledge, (as they will be clearly proved to have been) it is no wonder, if the Writer, who personated his Lordship, should insert all that was proper to fasten the Suspicion he intended on him.

Another Proof that they were dictated by his Lordship, they say, is, from the Subscription of the Names *Jones, Illington*, and the No 1378. which are all affirmed to denote his Lordship : And the Reason why that Number belongs to him, is, because the Decypherer has found that Number to denote the proper Name or Title of a Person beginning with the Letter R. If this is his real Opinion, must that needs be the Bishop ? Is there no body else, whose Name or Title begins with the same Letter ?

But, with Submission to your Lordships, it seems impossible to affirm even thus much with any Degree of Certainty, and must be only Matter of mere Conjecture. Dr. *Wallis*, who is allow'd to be the Father of the Science, (such as it is) and was the Wonder and Envy of all Foreigners, directly owns, that the Whole was built upon Conjectures ; and he that had the best *Guess*, was the best *Artist*. Such, my Lords, is the Science of Decyphering. And from such uncertain and conjectural Premises, what certain Conclusion can possibly be drawn ? And 'tis plain, Mr. *Willes* is not so infallible as he pretends to be, by that Number of Passages not yet decypher'd.

When we took our Objection first against the Nature of this new sort of Evidence, the Counsel for the Bill were pleased to cite a Statute in *Q. Eliz.* Time, wherein they said, the Word *Cypher* is mention'd. I have since look'd for that Statute, but could find nothing about it ; and, perhaps, may be mistaken in the Statute which they mean. But, my Lords, I am sure they did not mention any particular Tryal, where it was ever heard of, or allow'd as Evidence. I rather believe, that, according to the Notions of those Times, (for soon after, the Statute was made against *Witches*) if any Decyphers had appear'd then as Evidence, they might have been in more Danger than the Criminal.

But if there are any certain Rules, or any reasonable Methods in Decyphering, I am sure 'tis highly improbable, that Persons so cunning and wary, as these are all along represented to be, should be guilty of such a fatal Oversight, as

just to sign with such Numbers, that all, it seems, who understand Cyphers, must necessarily know, intended for the Initial Letter of their Names. It would, my Lords, in my humble Opinion, have been more consistent with that Care and Caution, to have made those Numbers stand for quite contrary Letters, and those Letters to have been express'd by quite contrary Numbers; and there is no doubt, but they might have made any others signify the same thing. However, since the Decypherer has not shew'd us by what Methods he has arrived at this Conclusion, 'tis impossible for us, by any positive or direct Evidence, to confute it: But 'tis sufficient for us to deny on the one Hand, what he has on the other Hand affirm'd, without telling us the Reasons of it.

That the Names of *Jones* and *Illington* belong to his Lordship, is endeavour'd to be proved by some Passages in subsequent Letters, and by refining on the Matter of them, which they think is applicable to his Lordship only.

I have already mentioned Two of those Instances, viz. his Lordship's own Indisposition, and the Death of his Lady, which are likewise mentioned in the subsequent Letters, in order to fasten the Imputation intended, yet deeper on him. There is a Third, which relates to the Present of a Dog.

That such a Dog was sent does indeed appear; but that his Lordship had received it, or saw it, or had any Letter or Message about it, has not been proved, and he positively denies it; and to whom, or from whom it was really sent, Mr. *Kelly* can best determine, and his Lordship must refer himself to what he has always affirmed in his Examination; and (if I am rightly inform'd) since re-affirm'd at your Lordships Bar, that he gave it to Mrs. *Barnes*, and designed it for her from the first, and for her only.

My Lords, I should apologize for taking Notice of such minute and low Circumstances; but it is the Evidence and Nature of the Proof made use of against us. I should rather have expected, that ingenious Gentleman (the Decypherer) would have shewn, by some Rules of his Art, that the whole Story of the Dog had been a Fable or Fiction, and explain'd it to something that was reasonable and probable, which I am sure this is not, to suppose (as the Letters read to your Lordships do suppose) *Musgrave*, i.e. *Mar*, in one Part of the World, General *Dillon* in another, widely distant one from the other, and a learned Prelate, to be in such Tribulation and Concern for a little Dog; which no way suits the Characters of any one of the Persons to whom it is applied; much less the Circumstances of this Learned Prelate, who had at that time a much nearer Concern upon him, from the Death of his Wife, and was himself in such great Disorder and Weakness of Body. The speaking therefore of this Present, backwards and forwards, with such particular Circumstances, and the Report of it so industriously spread many Months before my Lord Bishop's Apprehension, (as some of your Lordships cannot but remember) is absurd and ridiculous upon all other Suppositions, but upon the Design of fastning something on his Lordship, the Point all along in their View.

Rep. 40.
App. E. 42.

If the Writer of these Letters had been really and truly informed of his Lordship's Circumstances, he might, perhaps, more properly have affirm'd it of his Lady; which 'tis plain, the Writer was not, because he speaks of her as Living 11 Days after she was Dead. And how ignorant of them the Writer really was, appears by another Passage in that very Letter; where he says, "Mr. *Jones* is come to Town for a Day only, May 7th." Whereas his Lordship had been in Town Two Days, and staid Three more, as appears even by their own Evidence, *Lawson* and *Wood*.

App. D.
47. 8.

By these your Lordships may see, How many forced Inferences and Constructions, and what a Train of Absurdities and Suppositions are necessary to support one poor, and (if true) yet inconsiderable Assertion, when once we depart from the sure and known Rules of Law!

A Third Way of proving these Letters to be the Bishop's, is from the Hand-Writing, which is supposed to be *Kelly's*, and he is supposed to have been his Lordship's Secretary in these Matters: Both which Suppositions are destitute of any proper or satisfactory Proof.

The First is attempted to be supported by the Testimony of the Clerks of the Post-Office. But before I speak to the Testimony which they have given, I must beg Leave to offer one Word as to their Manner of obtaining of it; and shall endeavour not to transgress your Lordships late Resolution: And when I mention any Words of that Act of Parliament, it is only to shew the Cautious Measures the Legislature took even in imparting this Power to them, and the just Apprehensions

sions they had of the Abuses and ill Consequences that might attend it. My Lords, I am so far from endeavouring to bring them in Danger of a Penalty, as the Counsel were pleased to object, that I am willing to suppose those Clerks had proper Warrants at that Time, and for that particular Opening and Detaining. But that is all which the Act gives, and the Words of it are fully satisfied by such a Construction, without going farther, and extending the Words of the Act to that which was not in the least within the Intention or Purview of it. It don't appear to me, my Lords, I confess, how they are empower'd to take Copies (for all such Acts which are in Restraint of Trade and Commerce, are to be strictly and literally construed): But I am utterly at a Loss to know, from what Words of the Act it can be inferr'd, that such Copies shall be received as Evidence in Courts of Judicature; and not only against the Writer himself, but against other Persons too.

A private Act of Parliament (tho' printed in *Rassal* and other Authentick Collections of Statutes) has been disallow'd, when it has not been examined with the Record. But, my Lords, I don't know that a Copy of any Thing was ever allow'd as Evidence, but what was made by a proper Sworn Officer, known in Law, and where every one may have Access to it; and therefore, if false, may be disproved by the other Side. But is there the same Reason here? My Lords, can the Party ever have an Opportunity to disprove it, if falsely copied, when the Original is sent forward? Or, if it were still in their Possession, have we any Power to procure a Sight of the Original? or to have a Copy of that Copy? And therefore, we hope your Lordships will not regard that Part of the Evidence, if it were material. But to consider also, my Lords, what it is they have deposed of these Copies; That the Originals were written in the same Hand with some Papers shewed them; and which, they were told, were Mr. Kelly's Hand-writing. Your Lordships, I doubt not, observe the Time when they deposed this first, viz. the 24th of *August*, and afterwards the first of *January* last; i. e. The first of these Depositions four Months, the other eight Months, after they had seen the Originals of the 20th of *April*: For, they were forwarded by the Post, and the Clerks only took Copies of them, and did not detain any one Original for a Specimen till their first Deposition; and surely that was a little of the lateft: So that it rests singly upon the Memory of the Clerks for four or eight Months. I think *St. James* says, *That a Man may even behold his own Face in a Glass; but he is no sooner gone, but he straitway forgetteth what manner of Man he was*: And it is much more impossible for any one so exactly and nicely to remember all the little Strokes and Dashes of the Pen, by which the Sameness or Diversity of Hands can only be made out.

And all *Malone* swears, is, That he believes it to be *Kelly's* Hand-writing; and 'tis remarkable, That his Deposition is but in *January* last, and he left *Mrs. Barnes's* Service in *May*, so that he could not have seen him write since that Time. He don't say, he ever read any of his Writing, or at most, the Superscription of a Letter: He might, perhaps, see him write at some Distance, as he came in and out of the Room; but surely, that cannot be sufficient to form a Judgment of a Man's Hand-writing; and I am sure the Improbability is much greater after Nine Months Time. And *Hutchins* the Messenger, from seeing the Superscription of a Letter to the Secretary of State, has likewise, I think, taken upon him to swear the same thing.

But supposing these Persons had seen Mr. *Kelly* write frequently, and had, within a more reasonable Distance, swore it to be like his Hand, will any one say, That it is a sufficient, or even a reasonable Proof, in any Criminal Case? But because Mr. *Kelly* is all along affirmed to have acted in these Matters as his Lordship's Secretary, I must beg your Lordships Patience to consider, How far that Doctrine of Similitude of Hands has prevailed.

Colonel *Sidney's* Case was the first wherein it was ever admitted as a Proof in a Criminal Case; but that Judgment was afterwards Reversed by Parliament, as manifestly unjust. In *Lady Car's* Case, *Sid. Rep.* 419. which was only an Information of Perjury, yet a Letter under her own Hand was positively denied to be Evidence; though a Witness swore he believed it to be hers. I must own, my Lords, this Case, at the late Tryal of Mr. *Laver*, was not only denied to be Law, but all Men defy'd to make common Sense of it: But, with the utmost Deference to that Learned Gentleman that said so, I beg Leave to mention the Words of Sir *J. Hawles* upon that Case, who was of a different Opinion. "At that Time," says he, when the Case of *Lady Car* was adjudged, besides *Trifden* and *Keyling*, Two very eminent Judges, there sat in that Court Sir *Wad. Windham*,
F "whom

whom all will own to have been the Second best Judge who sat in *Westminster-Hall* since the Restoration; and if it is not Evidence in Misdemeanor, much less, says he, in Treason. Which Inference, besides the Reason of the Thing itself, is supported by the Authority of Lord Coke.

In my Lord *Preslon's* Case, his Hand-writing was proved by Three Witnesses, that had belonged to him while in the Secretary's Office, and must necessarily have seen him write a thousand Times: But that was not all; for those Papers were seized by him, sealed with his own Seal, as he was going to *France* in the Heat of War, contrary to an Act of Parliament, which at that Time made it Treason.

In the Trial of the Seven Bishops, the same Question arose, Whether Similitude of Hands was a Proof in a Criminal Matter? and it was not admitted.

In *Francia's* Tryal, before all the Judges at the *Old-Baily*, it is positively laid down by the Chief Baron, and not contradicted by any others, That it was no Proof or Evidence of itself; and the Letter in that Case would not have been admitted, but that it was found by his Bedside, and a Copy of the very same Letter enter'd in his Pocket-Book, which he had owned and explained to some Lords of the Council.

In *Crosby's* Case, the Hand-writing was sworn to by Three positive Witnesses, and owned in one of the Papers by the Prisoner himself; yet Lord Chief Justice Holt and the Court held it no Evidence, *Because one Hand, says he, may be like another, and Presumptions shall never take Place in Treasons.*

In the late Case of Mr. *Laver*, 'tis well known, that besides the Proof of his own Hand-writing, the Treasonable Papers were deliver'd, by his own Hand, to the Witness; and 'twas upon that Ground only, they were permitted to be read against him. Besides this, he had said that before the Lords of the Council, which the Court thought amounted to a full Acknowledgment that it was his Writing. But even all this, my Lords, was made use of against him, but as concurrent Evidence, because there were Two positive Witnesses, *viva voce*, against him as to the other Overt-Acts.

I will mention to your Lordships some Foreign concurrent Authorities upon this Point, to shew, that the Reason and Equity of this Doctrine has been Uniform and Universal, That Similitude or Comparison of Hands is not a sufficient Proof of it. There is a famous Case of *Jean Millard*, in a Book called, *Le Journal du Palais*. He had lived 40 Years from his Wife, and then returned and reclaimed her, after she was marry'd to another. One of his Methods made use of to prove him to be the same Person, was, The Hand-writing of Letters that had formerly pass'd between them: Which occasion'd this Question before all the famous Judicatures of *France*, "Whether the Testimony of skilful Notaries, who fully deposed of the Similitude of the Hands, was a sufficient Proof in this Case?" and it was universally denied. And yet this, my Lords, was a Case highly favour'd in all Laws; but more highly in those Places, where Marriage is reputed as a Sacrament, and in Favour of which they will often admit even the Party's own Oath.

Codex Fabrianus, Lib. 4. Tit. 14. Def. 71. says, "A Proof by Comparison of Hands, is a very dangerous Proof: *Idque in causis civilibus duntaxat, sed in criminalibus, in quibus periculum majus versatur, aut capitis, aut existimationis, non item.*"

Voet, an eminent Modern Civilian, Lib. 22. Tom. 4. Sect. 11. to the very same Purpose. And so does *Cajacius* in his Commentary on the Novels 73. "The Romans, says he, never allow'd it, but when no other Proof could be had. And in latter Times, when Forgeries became more frequent, they would not allow of it at all, unless the Writing had been acknowledged by the Party, or proved by Two Witnesses who saw him write it."

And then it was necessary to bring both into Court, that the Judges themselves might make the Comparison, and not leave the Witnesses to be the only Judges of it.

But it was never known, and I may defy all the Writers of Law, to shew me One Instance, that any Evidence of the Similitude of Hands (which can only be made out by Comparison) was admitted, but where the Papers pretended to be written in the same Hand, were produced and compared: Which is so far from being the present Case, that even the attesting Clerks, who are the only Witnesses in the Case, never had an Opportunity of comparing the Original Letter stopp'd in *August* last, with any one of the Three Original Letters dated *April 20.* or with any of the intermediate Letters, which they affirm to have been written in the same Hand.

And if it be consider'd, how much more difficult it is to distinguish the Hand of one writing in Figures (which stand single one from another) from the Hand of one writing in Words at length (which are variously Connected and Combined) your Lordships will never give them the least Degree of Credit.

But at once to put an End to this Evidence (if my Instructions are true), it has already appear'd to your Lordships, upon Mr. Kelly's Bill, That the only Original Letter of the Twentieth of *August*, stopt as a Sample at the *Post-Office*, and the only Ground of affirming these Three to have been his, was not his Hand-writing; and, if need be, we have the same and stronger Evidence to produce. Upon the whole therefore, I think I may affirm, That there is no legal or reasonable Grounds to infer those Letters to have been wrote by Kelly.

And surely, my Lords, it was incumbent on them to prove, as well as to affirm, that they were wrote by his Lordship's Direction, before they can affect him; even tho' the Writer (whoever he was) had presumed to have signed them with his Lordship's own Name and proper Appellation. I beseech your Lordships, how does it in the least appear, that Mr. Kelly, (or Mr. Cart, as is afterwards upon no better Grounds suggested) was employ'd by his Lordship to carry on that Correspondence? It has, I confess, been frequently said at your Lordships Bar, as well as by that Honourable Committee, but like other Charges, without any Shadow of Proof; unless it be an obscure Passage in a Letter of *Chitwell* from Abroad, to one *Williams* here, D. 27. which says, *They had a Story in France of Weston's Clerk being laid up for Debt*: Which, as I shall afterwards shew, could not possibly mean his Lordship. There is another Passage also in the Letter to *Dubois*, from whence the same Inference is made. What unknown Person that *Dubois* is, don't appear, or whether it is a real or fictitious Name; for all their Lists and Cyphers afford nothing like it. The Committee are pleased to suppose it a Letter to the Bishop, and received by him from Abroad, and from thence infer, he used to receive Letters directed to him by fictitious Names. The Counsel for the Bill suppose it a Letter from *himself* to *himself*, because the Hand-Writing, they say, (or rather the Letter *e*) is something like his Lordship's. It is not Signed by any one, and dated only the Sixteenth of *December* without any Year; and tho' that Honourable Committee are pleased to affix, in their Observations on it, 1724, because *Johnson*, they say, was about that Time at *Paris*, yet for what appears from the Letter itself, it might be written before his Majesty's Accession, or before the several Acts of Grace that have been; and if it had any Criminal Meaning, 'tis improbable his Lordship would have mentioned the Hand of Conveyance at length; and much more improbable, that he should have destroyed all his other Letters (as the Committee are pleased to insinuate) and to preserve this only, which is of no Consequence, but to furnish Evidence against himself, and to explain the Thing most wanted. Another Proof that it is his Letter, is from a broken Seal, which, they say, is made by the same Seal as that seized on his Servant at the *Tower*. But consider, my Lords, how many *Similitudes* we are at last come to in this one Attempt, *Similitude of Hands, Similitude of Figures, Similitude of Characters, and Similitude of Seals*!

That Similitude of Hand-Writing is no Proof, I have shewn by a Variety of the best Authorities; much less, the Similitude of one Letter in the Alphabet; that is, I dare say, a Conceit perfectly New. And 'tis well known, Artists are capable of counterfeiting any Man's Hand or Seal in such a Manner, that even the Person whose Hand or Seal it is, shall not be able to distinguish it from his own: And your Lordships Yesterday saw an ample Specimen of it.

It is upon these Grounds, my Lords, that Kelly hath been affirmed to have been his Lordship's Secretary in these Matters; but there is not the least Charge or Pretence of his having writ any other Letters of any kind for the Bishop, but these Three only, and not one throughout the whole Correspondence charg'd to have been written by Cart, (though he is in general charged as another Manager of this Correspondence). This, my Lords, we must insist, ought to have had the fullest Proof, and the most undeniable Evidence: For it is the Gift of the Offence, 'tis the Foundation of the Statute 14 *W. c. 3.* and 'tis the particular Suggestion of this Bill. 'Tis possible some such Letter might be wrote by Kelly or Cart to the Persons they are address'd to, without the Bishop's Privy or Direction; 'tis not so uncommon a Thing to pretend Acquaintance with Persons of Distinction, or to make use of their Name and Authority, to give themselves a greater Degree of Credit with their Correspondents.

If this may be so, and ought now to be presumed so, since no Man has proved it otherwise; then no Man surely ought to suffer by the Act of another, or to be punished for another Man's Fault.

I believe no one will think it any Reflection to hear many of your Lordships Names in these Cyphers, and afterwards to find a frequent Mention of them in the Correspondence; or to find His Majesty's own Name in *Plunket's* Cypher, under the Disguise of *Hawkesby*, and, Page 62. of the *Report*, Compliments from the Pretender and his Wife to one *Hawkesby*. No Man, I say, will apply these, or many other Names of Persons of Honour mentioned in them, to the Persons themselves, or imagine those Letters were really wrote by their Privity or Consent. By the same Rule of Justice, and by a Parity of Reason, my Lord Bishop's Name may be presum'd to have been made Use of, without his Privity or Consent; and if there is any certain Rule or Position in Law, it is this, That all Presumption ought to be in Favour of Innocency.

And to shew the little Intimacy there was between his Lordship and Mr. *Kelly*, (if *Rig* means his Lordship, as they suppose, or that Letter *E* 64. was from *Kelly*, as they also suppose) it will be sufficient to remind your Lordships of one part of it, where the Writer says, — "That *Rig* and one *Skin* had been together; but the Result of their Meeting he knew nothing of. *Rig* had fixed his Suspicion somewhere, though I cannot find out the Place; but you will hear it from *Skin*, to whom, it's probable, he may have communicated his Sentiments that way." That is, my Lords, if I understand the Meaning of those Words, that *Kelly*, the supposed Secretary on all these Occasions, knew nothing of the Matters, or at least much less than *Skin*, whom *Kelly* had but just before introduced into *Rig's* Acquaintance.

There is another Letter which has likewise been read, *E* 47. (if it is to be understood to be Mr. *Kelly's*, as they suppose, and *Rig* is to mean his Lordship; though we are far from admitting the one or the other) which we desire to make use of, and amounts to a full and direct Confession, that the Writer (whoever he is) had nothing in his Power or Knowledge to Charge him with. I have the more Countenance, my Lords, to repeat the Words of this Letter, because that Honourable Committee have let it pass without Exception, *Fol.* 59. of the *Report*: Wherein the Writer vows, "He never heard of the Cant Names of *Jones* and *Illington*, or who was meant by them; That some Persons in whose Power it was to do for him; had shewed no Concern at all for his Misfortunes; That it was well he had no Secrets to reveal, since such Usage might provoke a passionate Man." And all the World is since convinced he had not, since no Person seemed to be apprehensive that he could do them any Mischief. My Lords, I say, If this Letter is to be understood as from that Gentleman, we think we are intitled to have the Benefit of his Open and Candid Declaration.

But however, my Lords, if we should not be allowed to make this Use of it, yet, (if my Instructions are true) Mr. *Kelly* fully asserted this himself at your Lordships Bar; and even without it, we shall be able to make appear most plainly in the Course of our Evidence, that *Kelly* did not, and could not write these Three Letters from his Lordship's Mouth, or by his Lordship's Direction.

The Date of all Three is 20 *April*; when this Reverend Prelate (as has been already mentioned to your Lordship) was deprived of the Use of both Hand and Foot; had for a great while been confined to his Room, under the greatest Weakness and Disorder, and when his Lady lay in the next Room, on her Death-Bed.

These, my Lords, and other remarkable Circumstances in his Family, which distinguish this particular Period of Time, as on the one Hand, they have given the Writer of these fictitious Letters some Advantage towards fixing them on the Bishop; so, on the other Hand, they afford his Lordship a like Advantage (in the most Providential Manner, I may say) towards clearing himself from the Imputation of them. Because his Servants then attending him, are able to recollect what passed on that Occasion, and to be very positive and particular in their Evidence concerning it.

His Lordship happened then to have Three Men Servants actually attending on him, and some one of these always, both Day and Night, either present with him in the Room, or waiting in the Passage at his Chamber Door, and the Weather being warm, and the Room close, the Door was generally wide open: It was then this Reverend Prelate's Misfortune, that he was not able, without their Help, to stir, or even to lift up what he eat or drank to his Mouth. Besides these, there were Two Women Servants, which constantly attended his Lady in her Room, which is next adjoining, and came frequently to him (once or twice an Hour) every Day with Accounts how she did, the Bishop himself being disabled (for several Days before her Death) to go out of his Room.

And

And all these five Servants will depose, That for 14 or 15 Days before his Lady's Death, no Stranger whatever visited his Lordship, much less stayed there any Time with him. This, (my Lords) the Women-Servants will affirm, as far as their frequent seeing of him gave them Opportunity to make these Observations. His Coachman, (tho' now Witness against him) has constantly affirmed the same Thing both Below, as well as before your Lordships. But the three Men (one of which was always in the Room Day and Night, as I before observed) can be most full and peremptory in their Testimony. So that the Bishop could not possibly dictate these Letters, either to Mr. Kelly, or to any Body else, without the Privy and Observation of some of them.

This being a Negative, it is impossible to be more fully proved in any Case, and nothing but the remarkable Circumstances that happened at that time, to which the Writer of those Letters unluckily pinned them down, could have help'd us to so strong and undeniable a Proof of it.

Whether Mr. Kelly was ever acquainted or visited his Lordship (indeed I am not D. 47. 8. 9. instructed) their Evidence I am sure has proved nothing like it, nor is it material, E. 6. 6. c. much less criminal. But as to the particular time (12 April) when Mr. Kelly is supposed to have told Mrs. Barnes, and she is supposed to have told Mrs. Levit, that his Lordship sent his Coach for Kelly, we shall expressly prove the contrary; and besides that it is only hearsay of Mrs. Levit from Mrs. Barnes who denies it, and his Lordship's Disability at that time to receive Company; I say (my Lords) besides these Circumstances, it is remarkable that the Coachman, and the Baker (who it seems was directed to keep a Diary of every Body that came, and of all that happened in his Lordship's Family) says not one word of this remarkable Incident, in either of their Depositions. The Coachman has denied that he ever fetch'd Mr. Kelly in his Lordship's Coach since he lived with his Lordship, or ever was at Kelly's Lodgings, or that he ever saw him or Mr. Cart in his Life-time; and surely their Silence (if there were nothing else in the Case) is sufficient to infer, that he was not there at that time: And all Mrs. Kay and Malone swear is no more, than that they don't remember Kelly lay at Mrs. Barnes's that Thursday or Friday (the first only speaks in her printed Deposition of a Thursday or Friday about the middle of April.) And how is it possible they should remember the time so exactly, for neither of them belonged immediately to Kelly, but were only Servants to Mrs. Barnes, who had other Lodgers in her House? They did not even make these Affidavits till the 6th of February last; and 'tis no easy Matter to remember such an inconsiderable Circumstance of a Lodger (ten Months together) unless they likewise had been instructed before hand to keep Diaries of Mr. Kelly's Motions.

The Third General Charge against my Lord Bishop, is the receiving of Letters Rep. 41. from Abroad relating to this Conspiracy. Appen. D. 24.

Two Instances only of this Kind have been produced. The first from *Motfeild* Rep. 51. (interpreted *Mar*) 11th May, addressed to *Illington*. Appen. D. 35.

The other from *Digby* (supposed to be *Dillon*) 14th July, addressed to Mrs. *Weston*. Neither of which (do they pretend to say) came to his Lordship's Hands, or if they had, that there is one criminal Word contained in them, and consequently could not be (as I before proved) a treasonable Correspondence within the Letter or Intent of any Law.

That of *Motfeild's* is a meer Letter of Friendship, and (if from Lord *Mar*, as they suppose) is to a Person with whom he never had either Friendship or Acquaintance; but really seems designed for no other purpose but to fix upon his Lordship the Letter directed to *Musgrave* of the 20th April (for the same reason interpreted *Mar*) the receipt of which is there acknowledged; and in his words of Condolence there is something (which 'tis said, points out his Lordship's Character and Function) tho' in my humble Apprehension, no more applicable to his Lordship, either as a Bishop or a Clergyman, than to any other Person; especially if it be considered (as it really is) the Stile of a Letter of Compliment. But if the Letter it self, to which this is pretended to be an Answer, should prove to be a meer Fiction, the Answer to it, (tho' it were Criminal) must fall with it, as part of the same Contrivance.

And as to the Letter from *Digby* to *Weston*, tho' that Hon. Committee seem to lay some Strefs upon it, by Printing it at length in their Report, yet there is nothing in it that can affect any Man criminally, but his Lordship not at all;

because the Passage in it, relating to his Health, and the Concerns of his Family, cannot possibly be applied to him. It implies, that he was then in a very ill State of Health (*July 25.*) and his Family in great Disorder, whereas his Lordship (I can speak it, my Lords, upon my own Knowledge, as well as the Testimony of several Clergy of his Diocese, and others) was then perfectly well, and able to transact all the ordinary Business of his Diocese and Deanery, and had been so for above two Months, having myself the Honour at that time to be concerned with his Lordship in a very tedious and intricate Enquiry; and the disorder in his Family (if it means the Death of his Lady, for that or nothing is meant by it) had been over a much longer space of Time.

Nor is it probable that such a Mistake should be made by the Person (whom the Name of *Digby* is supposed to denote) if what the Report p. 39. and the Appendix D 32 and 29, informs us, be true, that two Letters had sometime before been written to *Digby*, or his Secretary, the one (*July 4.*) assuring, *Weston* was never better in his Life, the other (*14 July*) affirming he was then perfectly well. But it is still more implorable, if your Lordships will consider what that Hon. Committee have justly observed, in the very same Leaf, that the Professions of these two Correspondents were so foreign and different as to lay no sort of Foundation for Intimacy or Intercourse between them; and the natural and only Conclusion (we think) from hence, is, that the Letters on this Head, either from this or the other side of the Water, cannot be genuine; and that no fair or regular Correspondent could be guilty of such gross Mistakes.

And of both these Letters from *Morfeild* and *Digby*, your Lordships have (I doubt not) observed, that there is no pretence of Proof concerning the Hands in which they are written; which surely would have been more requisite, than the Application of feigned Names, to ascertain them. Otherwise any one who was acquainted with such Names, might write Letters from the other Side, as coming from the Persons designed by those Names, which they themselves were ignorant of.

And as the Receipt of these Letters by his Lordship has not been proved, so there is not any Insinuation or Pretence that he ever answered them, tho' they both bear Date long before his Lordship's Commitment.

This part of the Scheme therefore for charging his Lordship with a foreign Correspondence under fictitious Names, was not so artfully contrived, as the former; and seems, by so many grosser Mistakes, to have proceeded from some Body that had a much worse Intelligence concerning his Lordships Affairs.

I shall here beg leave to take Notice of the Letter taken from one of his Lordships Servants in the *Tower*, on which the learned Counsel have laid such great Stress, because there were no Professions of his Innocency in it. If there had been I suppose they would not have been much regarded. Why therefore should it be any Argument against him, because there is no such thing? Matters are at a very low Ebb, when such Trifles are relied on. But there is another Reason. That Letter I suppose to have been intended for some near or intimate Friends, and to such Persons there was no need of making such a Profession. They knew (whoever they were) and were before sufficiently persuaded of his Lordships Innocency, and that it was impossible he should be guilty of what is laid to his Charge. And by what has already appeared to your Lordships, I may say, this Reverend Prelate had no need of making such an Apology, and that the Persuasions of his Friends were not ill grounded.

The Fourth Head, to which the Charge against his Lordship may be reduced, is the Coincidence of Circumstances, Times, and feigned Names in the intercepted Correspondence, to induce your Lordships Belief of the before mentioned Hearsays and supposed Facts, that his Lordship, and he only, is meant by that Correspondence.

And the chief Observation about the Coincidence of Times and Circumstances, relate to the three Letters of *April 20.* his Lordships Illness, and the Death of his Lady, and the present of the Dog about the same time. All which have already been accounted for, either as Truths publicly known, turned by ignorant or malicious Correspondents to ill Purposes, or as absolute Falsities, as will appear to your Lordships by our Evidence.

1. As to the Article of Times, of his Lordship's coming and going, it must be own'd, the Penmen of these Letters are sometimes right, but they are as often wrong, and the Mistakes are of more Consequence to destroy what is inferred from them, than the real Agreements, in Point of Time, are, or can be to establish it. There is no doubt, but the Correspondents on this Side (whoever they were, and whether out of Malice or Vanity) apprized themselves as well as they could of his Lordship's Motions, in order to give a colour of Probability to what they said of him; And yet it happens, that out of seven Instances occurring in these Letters, and referred to in the Report, three of them (if not four) are plain and gross Mistakes; Two only are true in all their Circumstances, and of the other two, it may be doubted whether they answer the Truth in every respect, or not.

First, As to the two doubtful Instances, one is 49 pag. Rep. D 29 where June 14. G. W. writes to *Quitwell*, Mr. *Wesson* is in the Country, I saw him two Days ago. If these Words mean, that he saw him two Days ago in the Country, (which is the most obvious Sense of them) then the Assertion is false; for his Lordship came to Town June 12. as appeared Yesterday by the Coachman's Book; but if they mean, I saw him two Days ago in Town, then the Assertion may be true.

The other Instance is Report 51, 52. D 14. somebody writes July 26. to *Maisonneuve* that *Rig* and *Skin* had been lately together, and that *Rig* went into the Country the Day after. Now by Depositions D 48, it appears the Bishop went out of Town July 21. they must have met therefore on the 20th, which don't well answer the Word *lately*, which one would think imported 6 or 7 Days more. And therefore these two Instances we set aside, as neither plainly true, nor plainly false. The three next are manifest Mistakes.

In *Hatfield's* Letter to *Musgrave*, May 7. it's said, Mr. *Jones* is come to Town D. 47. 8. only for a Day, and yet (if *Jones* means the Bishop) he had been in Town two E. 49. Days, and staid in Town three Days longer, for he came 5th May, and returned 10th May, as appears by *Lawson* and *Wood's* Examination.

So in a Letter of *J. H.* to *Dixwell*, June 12, it's said, *Rig* (supposed to mean the Bishop) is I hear in the Country, whereas his Lordship was at *Westminster* June 18 and 19, as appears by the Coachman's Books.

In a Letter to *Maisonneuve*, July 19. F. 59. *Rig* is again said to be in the Country; whereas his Lordship was at *Westminster* that very Day, and continued there till the 21st as appears by the same printed Depositions.

And the Mistakes in these three Instances are the more remarkable, because they all affirm his Lordship to be in the Country, when he positively was not whereas it was ten to one, but that even meer Guesses had been true; at a Time of Year that every one almost is in the Country, and his Lordship was really ten Days in the Country, to one that he was in Town, during the whole Summer.

But, *My Lords*, I must with some Regret take Notice, that none of these Mistakes are acknowledged in the Report of that Honourable Committee, tho' all the Letters and Passages are transcribed in it, particularly that of the 7th of May, E 42. These Words are inserted in the Report, page 41. [*Mr. Jones is come to Town*] but the following Words [*only for a Day*] are omitted, and yet the Section concludes, *that it agrees with the Enquiry made at that Time*, which indeed it does (as far as it is there quoted) tho' not with the Appen. E. 42.

What Enquiry of this kind was then made, and with what Views we cannot say, unless we may suppose it to be made by his Neighbour *Lawson*. If it was 'tis strange that he could not depose from his own Knowledge and Observations (in May) but only as to what he had heard and was told by *Wood*, his Lordship's Coachman, so lately as the 19th of February last. I would reconcile this if it be possible; and the most natural Inference I can draw from it is, that *Lawson* (or whoever that Enquirer was) had pretended to take some Account of his own at the Time mentioned by the Committee, which, upon Comparison with that of the Coachman's, he found to be manifestly false and Erroneous, and therefore would not produce or depend upon that; but we hope his Testimony can receive no Advantage from such a Conduct. And upon the whole it appears, that tho' more Industry has been employed on the Article of Enquiry, yet as many Mistakes have been made in it, as in any other.

And as for the Coachman's Book after all it cannot be entirely relied on; because the Entries made in his Book can only relate (as we apprehend) to the Charges of Turnpikes and Ferryings, or such other Matters for which he was accountable.

countable. He had no reason to take Notice in such an Account, when his Lordship was in the Coach, when, *Not*; and your Lordships have heard, cannot be positive on that Head. And therefore how exact soever his Accounts may be, in respect to those little Disbursements, they can add no Weight to the Observation drawn from them by that Honourable Committee; and tho' great Strefs has been laid on them, (with Submission to your Lordships) they amount to no more, than *that some Person on this side the Water, writing to some on the other side, are supposed to mention his Lordship, sometimes as in Town, or in the Country*; and from thence 'tis infer'd, that they had frequent access to him; and consequently the Matter of their Correspondence is imputed to him.

Had these Correspondents been exact, *My Lords*, in all their Accounts of his Motions, surely no such Conclusions could have been reasonably made; but as they are oft'ner wrong than right, it follows, they were not so well acquainted with his Lordship or his Circumstances, as (to serve their evil Purposes) they have pretended to be.

Having thus spoken as to the Circumstances of Times (which are thrown in to induce a Belief, that his Lordship was meant by that Correspondence) I shall next offer something as to the Cant Names; and tho' it has been already observ'd to your Lordships in various Instances, that the Names of *Jones*, *Illington*, and *Weston*, could not possibly belong to him: Yet give me leave, (*My Lords*) to say further, that *Jones* is not only a very common Name (for in one Society, I think, I remember no less than sixteen of the Name at once) but that Name is manifestly applied to very different Persons, even in the Papers contained in the Appendix. In *Plunker's* Cyphers, *Jones* denotes the *Germans*: Twelve or Fourteen Times it is supposed to denote the Duke of *Norfolk*, in three other Places to denote Sir *W. Ellis*; and even in the Letters imputed to *Kelly*, there are Passages (besides those already mentioned to your Lordships) which cannot with any Reason or Probability be applied to his Lordship: For instance, *D. 23. Jones and Illington* are within the Compass of two Lines plainly distinguished, as two different Persons, and therefore both cannot be apply'd to his Lordship. And in the same Letter as well as a preceding Letter, *D 13. Jones* is mentioned as having undertaken to do something for a Boy at *Eaton*; where it is well known, his Lordship has no Influence or Acquaintance, and if he had interested himself there on any such Account, it would easily have been discovered. And this, *My Lords*, is one strong Instance to shew the Ignorance of the Writer, even in some of his Lordship's most notorious Circumstances.

Rep. 48, 9.
49. 68.

A great deal of Pains has likewise been taken, by the help of divers Suppositions and Reasonings, to prove that *Rig* denotes his Lordship. However, I shall take Notice but of one, in the Letter to *Gerrard*, which is said to be Sir *J. D'Obryan*, Report 49. *E. 47.* Where something is said of *Rig*, highly Improper, and absolutely False, if to be understood of the Bishop. An Account is said to be given of the Difficulty *Kelly* had to get Bail, and it is added—*Your old Friend Rig indeed offered all that could be expected of the Poor Man.* (If my Instructions are true) *D'Obryan* is a Name his Lordship never heard of before, nor had the least Concern in procuring *Kelly's* Bail, nor knows to this Day who they are; the only Words applicable to him in this Passage, are those of Poor Man; and his Lordship permits me to say, that he is really such, poor both in Body and Purse, and as poor as his Enemies almost can make him; and tho' he may have reason (if your Lordships should pass this Bill with all the Severities intended by it) to be heartily sorry he is so, and that he has neglected those Opportunities of enriching himself, which others would have laid hold of; yet he gives me leave, *My Lords*, to say, he is not ashamed of that Poverty, because free from all unjust Acquisitions, and unworthy Compliances. But that he was a poor Man at that Time, *i. e.* unable to procure Bail (which is the Sense that Writer means it in) cannot with any Decency or Justice be applied to one of his Lordship's Interest and Station, if he had concerned himself in it.

Give me leave (*My Lords*) to take Notice of another Mistake of that Honourable Committee in the very same Letter; I mean, a Passage cited from it which is not in it, to prove that *Rig* and his Lordship are the same Persons; which I should have omitted, but that it breaks at once the Chain of Reasoning, there made use of. The Words are, *how far this late Affair may affect him (Rig) I cannot tell*, and *E. 47.* is cited for them. Now *E. 47.* gives an Account of *Kelly's* Examination

nation promiscuously with other Matters, and was written *June 11th*, but the Letter where the Words really are, is *E. 49.* of the 18th of *June* (near a Month after *Kelly's* Examination.) Nor is there a Word in that about the Dog, but it might be proper to confound these two Letters, and connect these two Particulars, in order to make out, that *Rig* and his Lordship are the same, tho' they have really no Relation one to the other.

We might add, my Lords, many gross Errors in the Application of Names, but if your Lordships are satisfied with the Justice of those already mentioned, (as I hope your Lordships are) there will be no need to regard the rest, for tho' they have some little Coincidencies of Time, yet they are dashed with so many Inconsistencies, and so many Falsties, that no fair Correspondent could be guilty of. But there is one which of all others bears hardest upon this Reverend Prelate, the most Criminal in the Matter of it, and from which he is most deeply concerned to clear himself; *i. e.* the Letter of *April 20th*, which has been over and over affirmed by that Honourable Committee, as well as by the Counsel for the Bill, to be a Letter to the Pretender; if that be so, and had been proved by any Degree of Evidence, to have been dictated by his Lordship, we should have been utterly at a Loss what to have said, in a Case that would have been so fully within the Letter of the Law. Part of it, my Lords, we have already shewn to have been charged on his Lordship without the least proof or shadow of Evidence, the other Part of the Charge we hope now to prove equally groundless and false.

That the Letter address'd to *Jackson* was not to the Pretender (whomever else it may mean) we think appears clearly from the Words of it, *our Circumstances on this Side*; a Phrase not only used by all Writers, but is the constant usual Stile throughout all the Papers in the Appendix in contradistinction to *France*, which is the other Side, but never to *Italy*, as the Case must be hear, if *Jackson* means the Pretender. The Instances in the Appendix are almost infinite.

There is another Reason, why we think the Name of *Jackson* cannot reasonably be supposed to denote the Pretender, is from *E. 30.* where there is mention of dividing *Clinton's* Money between *Medley* and *Jackson*, *i. e.* says the Rep. p. 54. between *Medley* and the Pretender. But it is not to be imagined that a Letter written from one devoted to the Pretender's Interest, should place *Ormond* before him; this is so unlikely that even the Committee, speaking in their own Persons at the bottom of this very Page, slide naturally into the other Way of placing the Words, the Pretender and *Ormond*. Besides this, my Lords, there are so many Familiarities [to mention but one, *all such pretending People*] in the Letter it self that it could never come from any one (as I before said, devoted to that Interest) at least not to the Pretender himself, but to some equal or rather to some inferior. *Jackson* therefore must mean some body else, some body in *France*, and not the Pretender in *Italy*, and on this supposition, every Word, and Phrase of that Letter is better accounted for, than on any other.

The Committee of that Hon. House below have been pleased also to observe, p. 45. 46. that *Jackson* appears from other Letters, to be the same as *Malcolm*, (which they say means the Pretender) and for this Reason; because [p. 54 E. 30] *Clinton's* Money is to be divided between *Medley* and *Jackson*. And pag. 56. somebody hopes *Clinton* has sent *Malcolm* half Money, which proves indeed, that either *Medley* or *Jackson* means *Malcolm*, but which may be still a Question, as much as it was before.

That *Malcolm* means the Pretender, 'tis proved, because application is made to *Malcolm*, in a Letter from *Scotland* for a Patent, and for Power to raise a Regiment, Rep. pag. 45, 75. but with Submission to that Honourable Committee, neither of these Instances prove that Assertion; since the most natural Way of applying in such Cases, is to Persons employed under the Principal, and not immediately to the Fountain Head it self, and if the late Duke of *Ormond* was to have come over last Summer to head the *Scots*, and they daily sent pressing Messages to that Effect (as Mr. *Stanhope* writes from *Madrid* Rep p. 75.) who more proper to be applied to by a *Scots Man* on both these Occasions? *Malcolm* therefore (with submission to the Committee) more naturally means the late Duke of *Ormond*.

I may add to this, my Lords, that in the Cypher incerted among the *Scotch Papers*, I. 14 *Davis* and *Lloyd* (not *Malcolm*) is said to be the Name and Designation of the Pretender.

H

I hope

Rep. 43.
50, 56, 61.
App. E, 49,
35, 55.

I hope we may be allowed to argue in this Manner, from one Cypher to another, because the same Method has been made Use of against us, upon this very Article, both by that Honourable Committee, and the Council for the Bill; for the only Colour there is for interpreting *Jackson* to be the Pretender, is taken from *Plunket's* Cypher, in which (as it is printed) *Jackson* is set over against the Name of the Pretender, and from the Titling to the Draught of a Letter of *Plunket's* to *Jackson*, C. 41. and admitting this Letter to have been so entitled by himself (which has not yet been proved) yet it does not follow, (as I before observed) that because a Letter address'd to one at *Rome* by *Plunket* under the Name of *Jackson* signified the Pretender; that another Letter directed to one of that Name in *France*, by a quite different Person, should likewise necessarily signify the Pretender. This, my Lords, I beg leave to say, is no certain or natural Consequence, but it is most certain, that that Draught (whomsoever it was intended to) was not written upon that Cypher which the Committee refer'd to, in order to have it thought to have been written for the Pretender; for there is but one only of the many Cant Names in the whole Letter which is to be found in that Cypher. But if your Lordships will be pleas'd to consider that Cypher a little farther, it will appear, that the very Persons supposed to be concerned in dictating this Letter to *Jackson*, were utterly strangers to the Correspondence; for it consists of a hundred and fifty Names, and no Man can find above four that are in this Cypher, or in all that voluminous Conspiracy attributed to *Kelly*; nor any of those four ever used in the Letters supposed to be writ by *Kelly*; but in those only supposed to be written to him from Abroad.

The Name of *Jackson* is not once in all that Correspondence applied to the Pretender; and though there be a hundred proper Occasions of mentioning him, it is always under some other Appellation. And *Plunket* himself in his Examination C. 73. Sec. 14. (when he could not possibly know the Tendency of the Question) not only says positively, that he never writ to any Person by the Name of *Jackson*, and does not know who is meant by it, but it is also remarkable (my Lords) that in all the Letters said to be written by him upon that Cypher (after it was formed) he never once styles the Pretender *Jackson*, but either *Joseph* or *Jepson*.

The first of these Letters is in *May* 1721, and therefore that Honourable Committee have with great Exactness placed this Cypher immediately before it, as supposing it about that Time framed; for all the preceeding Letters are manifestly written upon another Cypher. Now this Letter of the 20th of *April*, supposed to be dictated by his Lordship was written before that Cypher of *Plunket's* was framed, and consequently could not take a Name from a Cypher, which then had no Existence.

There is another Observation of that Honourable Committee, which I beg leave to take Notice of. They say, that the Cypher made use of in this Letter to *Jackson*, is the same made use of in the Letters from the late Duke of *Crmond's* Agents, and in Letters to *Dennis Kelly*; and yet the Pretender has some other Names in such Letters, but in none of them ever once styled *Jackson*. How comes it then, my Lords, that he should be styled so once, in this one Letter, and never before, nor after, by that Writer or by any other.

We have been the longer, my Lords, in removing this Imputation, because of all others it is the hardest and most unjust upon this Reverend Prelate; and upon the whole, we hope, it is fully and effectually done, (notwithstanding the Difficulties we had of proving a Negative) and even from those Lights and Materials the Committee themselves have afforded us; and if we had had an Opportunity of inspecting the Originals, we doubt not, we should have been able to have proved much better, that *Jackson*, (to whom this Letter of the 20th of *April* was directed) could not possibly mean the Pretender.

And if that be the Case, as it certainly is, and it appears farther by the Evidence which we shall produce, that these three Letters of *April* the 20. were not, and could not possibly be dictated by the Bishop, the foundation of the whole Charge is destroyed, and consequently, all the Superstructure must fall to the Ground. Nay, I will venture to affirm, that it is impossible for them to form any Scheme to prove the Bishop wrote these Letters, but what is, and will be actually disproved and falsified, by some Part of their own Evidence.

HAVING thus gone through, my Lords, every Part of the Charge, I must crave your Lordships Patience, yet to speak to two Things, which have been
much

much insisted on by the Counsel for the Bill. That when your Lordships proceed in a *Legislative Capacity*, you are not to be guided by the Rules and Niceties of Law, and therefore that we are not in this Case to expect an Evidence strictly legal. The other thing was, *that at this time of Day circumstantial Evidence* is sufficient, in a *Charge of High Treason*, as the Case now before you is. This (my Lords) we have heard fully and often repeated, as it were to anticipate us in this Objection, which they themselves know to be so justly founded.

I have so far acted in Complaisance to them, as to argue chiefly on the Facts and Circumstances themselves, and under the very same Lights they have presented them to us, and hope (my Lords) our Inferences from them have been more just our Constriction more natural, and our Probabilities much greater than theirs; and even in that View (considered abstractedly from what the Common Law, and the common Justice of the Realm requires,) I hope we have fully shewn to your Lordships Satisfaction, and to the Conviction of every reasonable or impartial Person, that there are no Grounds for what is suggested in the Bill; and that all that hear me may justly wonder, how this Reverend Prelate comes to be charged (as he in the Preamble of the Bill (with being deeply concerned in forming, directing, and carrying on a Conspiracy; when it has not been proved, that he entred into any one Consultation, concerning any one Measure, gave any one Direction, that he has done any one Criminal Act, written, dictated, or received any one Criminal Letter, and if we should wave insisting on an Evidence strictly legal, or a Proof according to the known Rules of Law; give me leave to say, my Lords, because it is true, there has not been a reasonable Evidence.

But yet, my Lords, I shall always insist, both as an Englishman, and as Counsel to this Reverend Prelate, that there ought to be a legal Evidence in these, as well as in any other Criminal Proceedings. If there is any Difference, it is in this only, that as there are certainly many greater Inconveniences to the Subject in this Method of proceeding, there ought to be a stronger Proof, and a Conviction more strictly legal. I will always hope your Lordships will expect a Proof in such heavy Charges agreeable to the Laws of the Land, and the Rules and Resolutions of other Judicatures. I am far from thinking your Lordships are circumscribed by the Forms of inferior Courts, because they are in their own Nature discretionary, and the Courts themselves often vary and depart from them. But the fundamental Maxims of Law, the unalterable measures of Justice, and the positive Directions of an Act of Parliament are of another Nature; they are binding every where, to all Persons and Authorities, (as long as they continue Laws) the King himself not excepted. I should beg Pardon, for carrying my Assertion so far, but that I am taught by the Bill of Rights that the King himself is bound by the Law, that it is not in his Power to alter, suspend, or dispense with Laws. But if the Doctrine of the Counsel for the Bill is true, and every one at Liberty to follow the Dictates of his own Judgment, and what Rules he pleases, what Confusions, Uncertainties, and Arbitrariness must that introduce in all Proceedings? Private Opinion will to often be a Pretence to exercise private Malice, Revenge, or Ambition.

I might appeal to every one that hears me, whether he has not at some Time or other, believed some things as strongly as he did at first this Reverend Prelate to be guilty of what was suggested against him, and has afterwards found himself mistaken? What is more common than for Men that agree in the same Notions of Morality, to deduce different Conclusions and Applications from them? (even where Interest or Partiality do not intervene;) and therefore the Wisdom of the Law of England has been to determine general Notions of Justice and Right by particular Rules and Applications, in order to settle that Variety and Inconstancy, which without some established Rule must necessarily follow. Where then shall we go for those true and proper Notions of Law or Equity, but to those great Oracles and Fountains (my Lords the Judges?) What better Guide or more certain Rule, can any one of your Lordships propose to himself, than the constant and uniform Judgment of those, whom the Constitution of this Kingdom have made the proper Dispensers of Justice, and the Interpreters of Law.

'Tis your Lordships peculiar Advantage, to be continually assisted by some of my Lords the Judges, and we hope in this Instance (if any Doubt can at last remain) your Lordships will hear their Opinion with the same Difference and Candor as in former Cases. Let it never be said, my Lords, that you, who are the
supream

supream Oyer of the Kingdom, whose Judgments and Resolutions are Laws to other Courts, and ought to be an Example to all others, in the Justice and Equity of your Proceedings, that your Lordships will not regard the solemn Judgment of the Judges, or the Usages of former Parliaments: and let it not be said that because other Courts are bound by a Law, to require such and such Circumstances to infer an Offence, or such a Proof before they condemn a Man, that you (my Lords) will follow your own private Opinion, make what you please to be an Offence, without any Evidence at all, but upon mere Hearsays, Conjectures, and Suppositions. Who can read that melancholly Case without Concern, which my Lord *Coke* has in his 3d. *Instit.* of an Uncle that was condemned and executed for the supposed Death of his Niece, merely upon a Train of Presumptions and circumstantial Evidence: Or *Harrison's* Case withing Memory, where the Father and Mother both suffered upon Presumption for a supposed Murder; and with what Shame and Remorse did that hasty Judge see himself convicted by the Person returning from beyond Sea? And every one almost remembers the Charge of Treason against this Reverend Prelates Predecessor: if such a Bill had been thought on, or much stronger Evidence had been received, it might have pass'd before the Truth could have appeared. But happy was it for that innocent Prelate, that a quite contrary Method was taken, and his Accusers brought Face to Face to him by which he quickly discovered the Villany of those Miscreants. Private Opinion or Persuasion therefore is such a Position, that every honest Man ought to disclaim in these Cases, and the greater the Crime is, in which he is to judge the stronger Proof he ought to require; and when one adheres strictly to Justice and goes according to the *Allegata & probata*, by the best Rules and Reasons of Law; whatever Mistakes, Misinformations, or false Evidence may happen in the Case, he can never have Cause to repent, and neither the present Age nor Posterity can blame him.

It was formerly a Question, whether the *Star-Chamber* was bound by the Rules and Resolutions of other Courts: And the many Excesses, and extravagant Opinions in this Respect, was the Reason that ancient Court was laid aside. And it has been as great a Question, whether the Court of Chancery was to be guided by Rules and Presidents. But the better Opinion has always been, that a Judge in Equity ought to regard the Rules and Resolutions that have been in like Cases; unless he is resolved to make Decrees totally arbitrary.

For though Equity and Reason, in it self, is the same all the World over, and nothing can alter the proper and intrinsic Notions of it; yet, as the Matters about which it is conversant, are represented in different Circumstances, and, like Streams of Water, will receive some little Tincture from the Soil thro' which it runs, and something in every Man's Temper that will slide into his best formed Notions; it shews the Necessity of some fix'd and establish'd Rules, at all Times, and in all places of Judicature. And therefore, in that high Court of Equity, though the Rigor of the Common Law is in some respects softned, yet there is nothing more known than that it is not to be impeach'd in any of its essential and fundamental Points.

I hope your Lordships will pardon me, if I mention an Authority or two of great Name, that expressly say, the High Court of Parliament is likewise bound by the Rules of Law. Lord Chief Justice *Holt* says, 'The Authority of Parliament, is from the Law; and as it is circumscribed by Law, so it may be exceeded, and if they do exceed their legal Bounds and Authority, their Acts are wrongful, and cannot be justified any more than the Acts of private Men. I might add to this, the Oppinions of *Vauzban*, *Hales*, and *Hobart*, to the same purpose; that the Rules of Law ought to guide in passing of Acts of Parliament, as well as in the ordinary Course of Judicature. But when I mention the Sense of a living Authority, that has filled the highest Stations in the Law, and so great an Ornament to your Lordships House, and whose Merits have been so lately distinguished by new Honours, I need cite no more. It was in a Case, where the same Doctrine was advanced (that the Parliament was not bound to conform to the Rules and Proceedings of other Courts): In answer to which, that noble Lord with great Truth observed, that those Rules were not to be Patterns to them, only because they were Rules of those Courts, but because they were Reason, and Reason approved of by long Experience, and they obtain there as Rules for that Cause; and I hope (says he) that is a Cause why the House should imitate them, as much as *Westminster-Hall*; or else how can they be said to go according to Reason, or Justice, when they go beside, or transgress those Rules?

Besides

Besides these great Authorities, there have been Times, when Parliaments have thought themselves bound by the common Rules and Proceedings of Law, and Parliaments that were very tender and sensible of their own Power, in other Respects. Not to mention several antient Acts of Reversal, because Judgments given in Parliament were not pronounced according to the known Laws; there is the Act for the Attainder of the Earl of *March*, because he had been instrumental in procuring the Attainder of another Lord, under Pretence of a Letter, (which the Record expressly says) was no Evidence. And the Record for reversing the Attainder of *Roger Mortimer*, 28. E. 3. Sir *Thomas Haxley*, &c. is expressly declared to be, because they were attainted contrary to the good Laws and Customs of the Realm. And not only the Lawyers and the Histories of those Times condemn them as grossly contrary to Law and Justice, but the Stat. 1 E. 6. cap. 12. is directly levelled at them. For it recites that those Proceedings were terrible and extream, introduced for particular Policies and Purposes, repeals several Statutes that had been enacted in the preceding Reigns, and that there might be no more such for the Future, reduces all Treasons to the antient Standard of the 25 E. 3. and goes on and enacts, That no Person or Persons (*i. e.* my Lords, as I humbly apprehend no manner of Persons, in no manner of Place, Court, or Method) shall be convicted for any Offence of Treasons, Petit Treasons, Misprisions, for which the Offender shall in any wise suffer any Pains of Death, Imprisonment, loss of Goods or the like, unless accused by the Testimony of two lawful and sufficient Witnesses. The Stat. 5. E. 6. cap. 11. goes further, and says, There shall not only be two Witnesses, but those two Witnesses shall be produced in Person before the Party, and shall before his Face maintain and avow, what they have to say. The Words of this Stat. as well as the former, are as general, as they can be, without any Exception of Place or Proceeding.

But notwithstanding these two Statutes, there was still Occasion for the Stat. 7. W. 3. to ascertain Treasons and to regulate the Method of Trials. For there had been several tender complaisant Laws introduced by the pretended Zeal of Ministers, with a peculiar Eye to the Prince on the Throne, which tho' others could not apprehend the Justice or Necessity of, yet on these Laws here had been many unreasonable Penalties, undue and irregular Prosecutions, in the preceding Reigns, and which Sir *Jo. Hawles* remarks 'as one of the great and immediate Causes of the Revolution. And to shew the Repentment of the Nation, on these Proceedings, they were all reversed by particular Acts of Parliament; and to prevent the same for the Future, that glorious Statute was made of the 7 W. 3. cap. 3. That Persons accused as Offenders should be justly and equally try'd, and not be debarr'd of all just and equal Means for the Defence of their Innocency. And whoever casts his Eye over the preceding Trials, will find every Clause of that Statute as it were a particular Provision against the Mischiefs that had been, and to prevent the like for the Time to come.

I do admit (my Lords) there is a Proviso in the End of that Statute; [that it shall not extend to any Impeachments or Proceedings in Parliament] and therefore I don't mention it as a Rule to parliamentary Proceedings in all Respects, as it is to inferior Courts; but surely the Reason and Justice of that Act ought to be a Guide, as far as it is consistent with the Nature of your Lordship's Proceedings. And inasmuch as it was the Sense of the whole Legislature, and the united Voice of the Nation at that Time, and founded on a dear bought Experience, it is surely so far worthy of your Lordship's Imitation. It can never be consistent with publick Wisdom to run again into the same Mischief from which we are so happily rescued, or to split on the very same Rocks, on which many of your Lordship's noble Ancestors have perish'd.

And it can never be (with Submission to your Lordships better Judgments) a natural or a reasonable Construction of that Proviso, to enlarge the Proceeding of Parliament, or to give a greater Latitude than ever they had before; and to remind your Lordships how the Usage of Parliament was preceding this Statute; I need mention but two or three Instances out of many. Lord *Delamere's* Case in King *James's* Time, 1685, where there was one positive Witness and a strong circumstantial Evidence; and yet your Lordships Predecessors thought that not sufficient to find him guilty. The Lord *Stamford's* Case in the very same Year, where there was also one Witness, and strong Circumstances, and he was in the like Manner acquitted. In the Case of Earl of *Pemb.* 1677. for Blasphemy and abuse of the Sacraments, your Lordships Predecessors declared, That the single Testimony of a Commoner, tho' on Oath, was not suf-

ficient Evidence against a Peer denying the Fact upon his Honour; and upon that address'd his Majesty that he might be released from his Imprisonment.

And, as I humbly apprehend, your Lordships have thought fit to admit some of the Regulations of that Act into your Proceedings, such of them (as I before said) as are agreeable and consistent with the Nature of your Proceedings. Your Lordships have been pleas'd to allow Counsel to a Prisoner in Treason, to speak to Matters of Fact as well as Law: You allow a Copy of the Charge against him; you require the Witness for him to be upon Oath, as well as against him; neither will your Lordships admit Evidence of a Fact not in the Charge. And surely (my Lords) there is as much Reason, and as much Equity to require (as that Stat. requires in Courts below) the Testimony of two lawful and sufficient Witnesses. Nay, my Lords, I hope the Reason is much stronger, because (altho' your Lordships should consider your selves as unrestrained by the Stat. 7 Will.) yet it is positively requir'd by both the Statutes of *Ed. 6.* which are general and without Exception (as I before observ'd) and because it is agreeable to the Usage of Parliament (as I have likewise shewn) from that Time even down to the Stat. 7 Will. And if your Lordships are not enlarged by the Statute of King *William*, and the Statutes of *Edward 6.* are still Laws, give me leave (my Lords) to say, it can never be just or lawful to take away any Man's Life or Liberty on less Evidence than what those Statutes require, in any Place, or by any Method whatsoever. Because I am taught by Casuists, that every just Law is a Rule of Conscience, whether divine or humane; and no Man can say, his Conscience is void of Offence towards God or Man, unless he acts according to the Laws of the one Sort, as well as of the other.

And if your Lordships will give me Leave to step once more out of the Verge of my own Profession, I will mention a Word out of the Civil Law conformable to this: That is a Law (my Lords) in some Degree receiv'd by all Nations, as a Scheme of the greatest Equity and Justice. The Number of Witnesses by that * Law, ought to be two, at least, to make a full Proof, and free from all Exceptions, both as to their Person and to their Deposition. The Testimony of a single Witness is of no Validity, unless where other Circumstances concur; and it was not the Manner of the *Romans*, to condemn any Man, before that he, which is accused, have his Accusers Face to Face. And this (my Lords) is not only the dead Letter of the *Code* and the *Dig.* but the learned *Groenw.* in his Notes upon these Laws, says, it is the general Policy, and obtains at this Day in most Parts of the World. I do own that there are many Cases that happen with us in the Courts below, where the Testimony of two Witnesses is not required; but then, my Lords, it is, when the Trial is by Jury, that is, when twelve Men, coming from the Party's own Neighbourhood, and consequently must be supposed to know something of the Fact upon their own Knowledge, find a Verdict upon their Oaths. But I need not say, that even in a Trial by Jury, if it is a Case of High Treason, like this now before your Lordships, there must be two Witnesses, and nothing less can warrant the Verdict. And surely, my Lords, it is a Practice founded on Reason; not because this or that Law, or this or that Court requires it, but because 'tis absolutely necessary for the Discovery of Truth, and for the forming of a right Judgment, whether what is sworn be true or false. One Witness may mistake, or be perjured, and yet happen to be consistent with himself, but when there are two separately examined, the Truth is much more easily found out: And tho' a Criminal may now and then escape for want of such a Proof, yet that would be a far less Evil, than to trust so much in Cases so Penal to Circumstances and Presumption, and to the Malice and Mistakes of one Person.

But if, notwithstanding the Opinion of the greatest Lawyers both *English* and Foreign, your own uniform Usage and Resolution, and the Reason of the Thing it self, Your Lordships are resolv'd in this one Instance to follow, every one his own private and particular Conscience: Let every one hearken to that still Voice within him with an honest Attention, unto those secret Whisperings with Temper and Moderation. Let no Man be sway'd by Hopes, over-ruled by Fears, or transported by Zeal beyond the Bounds of Justice, and thro' this Reverend Prelate's Side give a Wound to himself or Posterity, which may never be cured. Consider, my Lords, if not for his, yet for your own Sakes, the Circumstances, the Probabilities, and Evidence on both Sides with an unbiass'd Conscience, and by the Measures of Law and Justice. For though some Proceedings may seem convenient to certain Times and Occasions, yet unless they agree with the Law, with Reason, and with Justice, no Man ought to think, he has any Power to consent. There

* Dig. 22.
5. 12.
Cod. 4. 20.
9.

There is a noble Instance on Record of the Lord *Digby*, and worthy of every one's Imitation. He had been, my Lords, one of the most violent Managers in the Impeachment of the Lord *Strafford*; and yet when that Proceeding was waved, and a Bill of Attainder brought in, he spoke as violently against it: Though he was still of Opinion (he said) that that Lord was the same dangerous Minister, and great Apostate to the Common-wealth, who must not expect to be pardoned in this World, till he was dispatched to another; yet he had rather lose his Hand, than put it to that Dispatch. He put them in Mind of the Difference between Prosecutors and Judges, and how unbecoming that Fervor was in them, now they were Judges, which perhaps might be commendable in them as Prosecutors. That when he gave his Consent to the Accusation, he was assured, his Crimes would have been fully and legally proved, which if they had, he could have condemn'd him with Innocency, as he had prosecuted him with Earnestness; but as the Case then appear'd, no Man could satisfy his Conscience in the doing of it. The Parliament, 'tis true, had a judicial and a legislative Capacity, the Measure of the one ought to be legally just, the other political and prudential; but these two Capacities were not to be confounded in Judgment; they were not to piece up (says he) the want of Legality by Matters of Convenience, to the Ruin of a Man by a Law made *ex posteroi*.

What can I say more? For it must appear to your Lordships by this Time, that this Proceeding is contrary to the fundamental Laws of the Kingdom, contrary to publick Wisdom, and Unjust in it self. That the Reasons and Suggestions upon which it is grounded have not been proved with any Colour of legal Evidence, or with any Degree of Proof or Probability which ought to satisfy the Conscience of an honest, reasonable Man. But if the Matters, which I have humbly laid before your Lordships, have not all the Weight, which I hope they have, or if I have omitted any Thing that is material or necessary for this Reverend Prelate's Defence, Your Lordships, I hope, as Judges, and (consequently in some Measure of Counsel for the Prisoner) will, from your own Observation supply it. Or if I have laid them before your Lordships in an improper Light, or a less effectual Manner than others might have done; yet the Case it self will speak better and more strongly than any Words or Expressions of mine can do. It is the Cause, the Fortune, and the Liberty of a most Reverend and Learned Prelate, who is to be stripp'd and torn from those Dignities and Preferments which his own high Merits justly called him to, and which he has ever since adorned with the greatest Lustre. Upon what slender and insufficient Grounds your Lordships have already heard; and I was going to say, without Precedent; but I must own there have been Instances of Deprivation, some in the Beginning of Queen *Elizabeth's* Reign, and some others since the Revolution. But yet they were upon a general Law, then in being, and an Incapacity voluntarily incurr'd by those Prelates after the full Knowledge and Publication of those Laws, by refusing to give that Security to the Government, which at those Times was absolutely necessary. And though they were peremptory in the last Degree, and their Example might have produced worse Consequences than it did; yet their Punishment went no further. But this is a particular Law, to be introduced for this particular Prelate, subsequent to the supposed Offence, and which is not thought fit to be enacted as a Law for any other Person hereafter; and I wish, my Lords, I could say, this Act went no further. But this Reverend Prelate is likewise to be deprived, not of his Life indeed, but of all the Conveniences and Comforts of it, of the Commerce of his Friends and Relations, and of all that is valuable to an *Englishman*. He is to be doom'd to the Curse of *Cain*, and to be turn'd out of his native Country, full of Age and Infirmities, to the Cruelty of Strangers and Foreigners, and even beyond the reach of his Majesty's most extensive Goodness.

But if your Lordships should pass this Bill, he will still have, I doubt not, the Peace of his own Mind, and this comfortable Reflection, which no Man can take from him; that he shares the Fate of the greatest and most honest Statesman of the last Century: tho' in this Instance also 'tis his Lordship's Misfortune to be very much distinguish'd. For He, tho' innocent, was afraid of the Violence of the Times, and withdrew from Prosecution. But this Reverend Prelate has been all along forth-coming, and, as it were, fearful of nothing, and conscious of nothing but his own Innocence, has sought in all Places to be brought to Trial. That noble Lord's Crimes (or at least his Accusation) were going to be proved in a proper parliamentary Manner by Numbers of Persons.

But this Reverend Prelate is to be involved by Implications, Inferences, Constructions, and the Conjectures of Decyphers, in Crimes, which he is here ready to deny, and of which no Man accuses him.

I would not be understood, my Lords, by any Thing I have offered in relation to the particular Penalties, as if I thought any one Suggestion of the Bill had been duly proved, so as to deserve this or that Part of the Penalties; tho' I must say, they are all so extraordinary in their Nature, as to deserve your Lordship's Attention. And I doubt not, but your Lordships in your Goodness will consider what is already passed, the Length and Closeness of the Imprisonment, which this Reverend Prelate has already suffered as a supposed Criminal. Prisons before Conviction are only for the safe Custody of a Man, and not for Punishment; but his Imprisonment has not been so; which (if my Instructions are true) has been attended with such unheard of Barbarities, and such distinguishing Severities, as are a Shame and Reproach to every civiliz'd Nation. The Case of *Colledge* every one has thought hard and barbarous; but 'tis this Reverend Prelate's Misfortune to be distinguished in this also, as well as in every Thing else: For that Case was before the Law allowed Counsel or Solicitors to assist a Prisoner in his Defence, but now they are allowed by Law, and were actually and duly assigned to my Lord Bishop; and yet part of his Defence, and part of his Evidence torn and taken from him. So that all these Things considered, his Lordship cannot escape without being a very great Sufferer, tho' your Lordships should utterly reject this Bill.

Your Lordships will also consider the Infirmities of Body, under which that great and noble Mind even now labours before you: which have render'd him almost incapable of attending his Defence. Your Lordships will also consider the Grief and Vexation it must be to appear as a Criminal before this Honourable House, where he has so long sat as a Judge, and under the Suspicion of those Crimes which are laid to his Charge; and how grievous it is for one of his Lordship's Character and Function, to be tax'd with Breaches of his Duty to God and Man, of Scandal to Religion, of Designs of overthrowing Church and State, in Favour of Popery: Who happens to be the only Clergyman in *England*, that ever thought it worth his while to draw his Pen in Defence of *Martin Luther*, the great Instrument of our Reformation from Popery, and who has upon all other Occasions appear'd the most strenuous Assertor of it. I might add much more of his Lordship's personal Merits, and of those high Abilities so eminently conspicuous in him; but that I know, it is some Kind of Violence to his Lordship to hear even thus much mention'd.

Yet suffer me to say, That if these Suggestions should be carried into a Law, without any Degree of Evidence or Probability, but rather (as your Lordships will immediately hear) against the strongest Evidence and Probabilities that are possible of the contrary: I say, if this Bill should pass on such Circumstances, whatever the present Age may think, his Case will be a standing Mark of Reproach to it, and he will be the Wonder and the Pity of all succeeding Generations.

I shall add to your Lordship's Trouble but one Word more, in behalf of my self: That your Lordships will pardon any Warmth of Temper, any unguarded Word or Expression that I may have been guilty of in the Course of this long Defence, in a Case, which every *Englishman* naturally considers as his own, and therefore will in some Measure warm the most even Temper. And that this Learned (and whom I will now call Innocent) Prelate, will accept those little Services I have been able to perform, and will pardon the many Failings, which I may already have been guilty of, in his necessary and most just Defence.



Mr.

Mr. WYNNE'S Close of the Lord Bishop's
Evidence, on *Saturday May 11. 1723.*

MY LORDS,

I Shall beg your Patience to close our Defence with an Observation or two on the Evidence that has been given by my Lord Bishop; and I need take up the less of your Lordships Time, because our Witnesses have fully answered all I opened, and in many Things have exceeded my Instructions.

And for your Lordships clearer Apprehension of so many various and perplex'd Facts, I shall just recapitulate what I humbly conceive to have been the Substance of the Charge against my Lord Bishop, and, as briefly as I can, state the Evidence, which we have produced in Order to falsify and disprove it.

The first and chief Accusation against his Lordship, was founded on the Informations of *Philip Neyno*, and therefore the first Part of our Proof was as to his Credit. Your Lordships, I doubt not, remember the Purport of his Information read against us, and the many gross Absurdities and Inconsistencies in his other Informations read by us, and likewise how fully they have been all disproved, and the Credit of them entirely blasted, even from *Neyno's* own Confession, several Times repeated and confirmed by three unexceptionable Witnesses.

Your Lordships have fully heard of the Terrors and Apprehensions he was continually under; because (as he himself express'd it) he had given false Information against this Reverend Prelate, and so many other innocent Persons. Your Lordships have heard the Inducements he had to give those Informations, and how often he had declared his Intentions to escape, in Order to avoid the Punishment which he apprehended most justly due to him, because he could not make out the Truth of them.

Two of those Witnesses (*Bingley* and *Skeen*) are still in Custody, and destitute almost of all the Necessaries of Life: I say, my Lords, they are still in close and strict Custody, and consequently there could have been no Opportunity to lead or instruct them in what they should say, or so much as to be apprized before-hand, (which surely would have been a reasonable Liberty) whether they could say any Thing material or not; and we are only beholden to those Lights which the Report of that Honourable Committee has afforded us. And all three of these Witnesses utterly unknown to my Lord Bishop, both in Person and Reputation, as well as his Lordship is unknown to them. They have not conversed together for several Months, but yet perfectly consistent with themselves, and entirely supported and confirmed by each other. And all three declare, they had very early told, and frequently repeated, this Account of *Neyno* to their Fellow Prisoners and Acquaintance, as long as they were permitted to have Access to them. Mr. *Skeen* being ask'd in relation to the Discourse between him and Captain *Pancier*, as in the printed Deposition of *Pancier*, App. D. 1. has denied on his Oath every Word of it. He says indeed that Captain *Pancier* us'd all his Endeavours by Treats and Entertainments to induce him to support his Informations; but that he never gave him, nor could give him any Grounds to say any such Thing of him.

We have shewn your Lordships, that Mr. *Stewart* in particular was so far from patching up, or contriving Evidence (as was objected to him by the Counsel for the Bill) after he had seen the Report and Appendix, that he had given this whole Account to several Persons long before. For he says, the Things which *Neyno* told him were so surprizing, that he could not stifle them in his own Breast. Tho' your Lordships, I doubt not, observed with what Difficulty and Modesty he was brought to speak out in this publick Manner, where his Evidence seem'd to reflect on a great and Honourable Person.

Two of these Persons have likewise been produced to your Lordships. To one of whom (Mr. *Gordon*) he told these Matters some Days even before *Neyno's* Death; and to Mr. *Kynaston* some considerable Time before the Meeting of the Parliament; and we could have called others to the same purpose, but that we were unwilling to give your Lordships further Trouble in a Matter which already had, as we thought, the fullest, the most satisfactory, and consistent Evidence that could be.

The second Head of Accusation against this Reverend Prelate, was upon account of the three Letters of the 20th of *April*. The two first we before observed to your Lordships not to be criminal, if really design'd for and addressed to the Persons supposed. The third we have likewise shewn by various

Circumstances and Reasonings, could not possibly be address'd to the Pretender, whoever wrote it, or whomsoever else it might be wrote to.

And the Evidence offer'd to prove them to have been dictated or wrote by my Lord Bishop, was first by the Subscription of the common Name of *Jones*, which they would have to denote his Lordship. As to this, I doubt not, your Lordships remember, that even in the Cyphers and Letters that have been read, the Name of *Jones* is manifestly applied (as the Committee themselves have observ'd) to many different Persons; sometimes to one, and sometimes to another, as the Circumstances there mentioned seem'd to give Occasion, but cannot once in any Place, with Reason or Justice, be applied to my Lord Bishop.

The next Proof that has been offer'd to your Lordships, to prove these Letters to have been dictated or wrote by the Bishop's Privy, is, from the ill State of Health, the Death of his Lady, and the Present of a Dog; Circumstances, which they say, are applicable to the Bishop, and to him only.

That his Lordship did not, nor could possibly write or dictate these three Letters, we have laid before your Lordships such a Proof, as the like hardly ever was before; and 'tis impossible, in my humble Apprehension, for a Negative to be more fully proved in any Case. Your Lordships have heard the great Weakness and Inability of this Reverend Prelate at that very Time for all manner of Business and Conversation. No less than six, if not seven of his Servants, have spoken fully and positively to it, That his Lordship was not able, without their Help, to stir, turn in his Bed, or even to perform the common and ordinary Offices of Life. One would think, my Lords, such melancholy Circumstances, in themselves, sufficient to guard any Man from Suspicion.

But the Witnesses have gone much further; for they have told your Lordships, that no Stranger approached the Bishop's Room all that Time; nor had any one been, for a considerable Time before and after the 20th of *April*, under his Roof. Even some of those Persons that usually were with my Lord Bishop at other Times (as his Son, his Chaplain, and his Son's Tutor) happened then all to be absent at the Election of *Westminster* School.

One of those Servants, who happens to be a Prisoner with his Lordship in the *Tower*, being asked, whether my Lord Bishop had not put him in Mind of these Circumstances, told your Lordships, that it was entirely his own Recollection, by casually taking up the Report, after my Lord Bishop was gone to Bed, and dipping on that Part of it, in which his Lordship is charged with having writ these three Letters. Upon which, the next Day (he said) talking to his Fellow-Servant, and he agreeing to the very same Circumstances, they acquainted the Bishop with what they had read, and how they could, from their own Knowledge and Remembrance, falsify and disprove that Circumstance.

I must likewise crave Leave to observe to your Lordships, that four or five of these Servants that have spoke to these particular Facts and Times, are still in Custody, under separate Messengers, without any Opportunity to converse together, and were hardly to be found by my Lord Bishop, when he had need of their Evidence; and yet every one of them have been perfectly consistent with themselves, and one with the other, and all equally positive.

The Bishop's Coachman, your Lordships, I doubt not, remember, tho' now under another Influence, and called as Witness against his Master, confirmed what they said, and was as positive and peremptory in his Testimony concerning this Matter, as far as the Nature of his Employment gave him an Opportunity to make such Observations. And upon the whole, I may now, with more Reason, and with greater Confidence, repeat my former Assertion, that it is impossible for them even to devise or frame any Scheme to prove his Lordship to have wrote or dictated these three Letters, but what will be actually disproved and falsified by some Part of the Evidence.

Another Reason, by which 'tis proved that his Lordship wrote these three Letters, was, from the Subscription of the Number 1378, to the Letter addressed to *Jackson*. Which Number Mr. *Willis* (a Decypherer) says, denotes the proper Name or Title, of a Person, beginning with the Letter *R*. The little Time we have had to enquire into this Assertion, and your Lordships not permitting some Questions, put by us to the Decypherer, to be answered, won't enable us flatly to disprove it. But with Submission to your Lordships, it seems impossible to affirm even thus much, with any Degree of Certainty, and must be (as I before observed to your Lordships) Matter of Conjecture only; and it appears manifestly to your Lordships by several Passages occurring up and down in this Correspondence, not yet decyphered, that
either

either the Art is not so infallible, or that Mr. *Wiles* is not so great an Artist as he pretends to be.

But, my Lords, admitting such a Number in this Cypher does really denote a Person's Name, or Title, beginning with the Letter *R*. what a strange and uncertain Proof is that, to fix a Charge of High Treason on the Bishop, when there are other Persons Names and Titles found like his, and many others which begin with the very same Letter; and this not to be admitted as Evidence in a minute or inconsiderable Circumstance, but in the very Gift of the supposed Offence, in the principal Foundation of the Charge, in the only Letter that is criminal, and which is to magnify and improve the rest into High Treason.

Another way of proving these Letters to have been dictated by the Bishop, was, because another, supposed to be an Answer to this, mentions the Present of a Dog. I need not here repeat what Mr. *Kelly* himself has constantly said in his Examination, because your Lordships, I doubt not, remember what Mrs. *Barnes* said; that Mr. *Kelly* indeed sometimes told her of another Dog that was for the Bishop, but that she always apprehended that Dog, which she had in her Possession, was designed for her, and never heard of any other Dog that did come from *France*; she owns, that she never received any one Message from the Bishop about it, but still kept it, when it was recovered, as her own, as long as it lived; and tho' his Lordship never had, nor loved a Dog in his Life, yet it would have been natural, and good Manners to the Person that sent it, especially if so considerable a Person as is supposed, to have made now and then some little Enquiry about it, if my Lord Bishop had really known any thing of the Dog.

But we have shewn your Lordships by the solemn Attestation of Mr. *Birmingham*, the *French* Surgeon, that he was the Person who gave this Dog (in *March* 22.) to Mr. *Kelly* for Madam *Barnes*, of whom he had received Civilities in *London*, and for no other Person, nor with any other Intent. He likewise says, that he never received any such thing as a Dog, or Message from Lord *Mar* (as alleged in the Report) never had any the least Thought of the Bishop of *Rocheſter*, or his Lady, much less of making either the one or the other (to both of which he was utterly unknown) any such Present.

Your Lordships observe this to have been a solemn notarial Act upon Oath, of a Person not only reputed, but attested likewise by the Lord of the Seignury, to have been a legal Notary, and to have exercis'd his Office as such for some time. That the Testimony of such a Person beyond Sea is a good and unexceptionable Proof in every Case, I need not say; or that it has been often allow'd here, where no other is to be had, nor any other Method to have the Benefit of a Man's Testimony that is beyond Sea. And our Witness has told your Lordships that he has frequently translated such Instruments. That he believes it to be the Notary's Hand-writing, and the publick Seal of his Office. I need not, my Lords, have said thus much, for in all Events it must surely have been of more Weight in your Lordships Judgments, than the Extract of an Information given by a Person, infamous in his Character, absurd and inconsistent in all he said, and without being signed or sworn to, even by that Person.

But yet this Affidavit of Mr. *Birmingham* has the more Credit, because his Majesty's own Resident at *Paris* (Mr. *Crawford*) has been pleas'd to examine him about this Matter (being employ'd by him in his Profession as a Surgeon) and he has confirm'd the same Account to him, which has been likewise transmitted and read to your Lordships.

Another way of proving my Lord Bishop to have been concerned in these Letters, was from the Hand-writing, which is suppos'd to have been *Kelly's*, and he is supposed to have been his Lordship's Secretary in these Matters. But both these Allegations, we think, with Submission to your Lordships, are still utterly destitute of any proper or satisfactory Proof.

I before observ'd to your Lordships, that the first time the Clerks of the Post-Office have made any Deposition about the similitude of the Hand-writing, was four and eight Months after they had seen the Original Letters, which is a little of the latest, so exactly to remember all the little Strokes and Turnings of a Pen, by which the identity or diversity of a Hand can only be made out. That *Malone*, the Footman of Mrs. *Barnes*, was never called upon for his Testimony till *January* last, that is, nine Months after he had seen any of *Kelly's* Writing, and consequently not then very able (if ever he was) to form a Judgment of it.

I have already observed to your Lordships, that this was the first, and the only Instance, that any Evidence of the Similitude of Hands was ever admitted,

2 Roll.
Rep. 346.
Law of E-
vid. 3.

admitted, but where the Papers pretended to be in the same Hand were produced and compared in Court; which is so far from being the present Case, that the Clerks of the Post-Office never had any Opportunity of comparing the Original of the 20th of *August*, with any one of the three Originals of the 20th of *April*, or with any one of the intermediate Letters, which they affirm to have been in the same Hand; so that they are made the absolute and ultimate Judges of this Matter, without any Possibility on our Side of detecting any casual or wilful Mistake.

And I would not again repeat an Observation I have before made to your Lordships, that a great Part of these Letters are in Figures, and how much more difficult it is to distinguish the Hand of one writing in Figures, from Words and Syllables in Length; because we have shewn your Lordships, by three positive Witnesses (well acquainted with Mr. *Kelly's* Writing, one of them above 20 Years, and his School-Fellow) that the only original Letter of the 20th of *August*, stopp'd at the Post-Office, as a Sample to the rest (and which is the only Foundation upon which those Clerks have affirmed these three Letters to have been *Kelly's* Writing) really and in fact, was not his, nor like it. This, my Lords, we have fully proved by three Witnesses; and as a Demonstration of what they said, they shew'd your Lordships, among a Variety of Papers produced to them at your Bar, that they could at once distinguish which was *Kelly's* Hand, which was any thing like it, and which was not.

Rep. Pag.
42. 45.
Append.
E. 26.

We have likewise produced to your Lordships, the solemn Attestation, on Oath, of *Alexander Gordon*, Junior, the Son, Banker at *Bologne*, that no such Packet of Letters ever came to his Hands, as mentioned by the Counsel for the Bill; and consequently he could not deliver any such to *Talbot*, (who they say, called for them at *Bologne*.) He further deposes, that he never had any Business or Intercourse with *Kelly* or *Johnson*, nor ever had Acquaintance with any Person so called, in his whole Life.

Append.
E. 26.

And we have proved to your Lordships, that *James Talbot*, the tall black Man, described in the Letter printed in the Appendix, and who is supposed to have been the Person that called upon *Alexander Gordon* at *Bologne*, for this Packet, was so far from doing it, at the Time supposed, that he was at *London* that very Day, as appears by the unexceptionable Testimony of *Edward Crofton*, his Shoemaker, and by the Entries of his Shop-book, to whom he accidentally paid a Bill upon that very Day, at his House in *London*.

We have likewise shewn your Lordships, by two Witnesses, Mrs. *Kilborn*, and her Maid, *Anne Ellis*, that Mr. *Kelly* was at her House in *London*, on the 20th of *April*, (the very Day upon which my Lord Bishop is supposed to have dictated these Letters to him,) and by a great Variety of Evidence, impossible to escape any one's Memory, that my Lord Bishop was ill in Bed, at *Bromley* in *Kent*, and *Quod non datur actio in distans*, is an Axiom of Reason as well as of Philosophy.

And I must humbly submit it to your Lordships, that it has not yet, in the least, appeared by any Shadow of Evidence, that Mr. *Kelly* ever was employed by my Lord Bishop to carry on a Correspondence; that he wrote any one Letter for the Bishop, upon that, or upon any other Occasion whatsoever.

That Passage in the Letter to *Weston*, that seems to give Countenance to such a Supposition, the learned Counsel for the Bill told us yesterday they had waved, and were angry that we should offer to disprove that which they had not proved. But, with Submission to your Lordships, tho' they have been pleased to wave that Part of the Charge against my Lord Bishop, yet as it makes no small or inconsiderable Appearance in the Report of that Honourable House, and will be so handed down to Posterity; we thought it proper to give an Answer to it; and, we hope, it has been to your Lordships Satisfaction, and still in your Memory.

The next thing was the Letter to *Dubois*, and I confess my self at some Loss to know for what Purpose that was read in Evidence to your Lordships; for the Counsel for the Bill have not, as yet, made any particular and direct Use or Application of that Piece of Evidence, and therefore I shall submit it to your Lordships upon the Observations I before made on it.

There was indeed some of your Lordships Time spent in comparing the Seal of that Letter, with that which happen'd to be taken on my Lord Bishop's Servant at the *Tower*; if it was intended as any Proof, I cannot at present judge; however, we thought it proper to follow them in the Course and Manner of their Proof, and your Lordships Yesterday have fully heard the Danger and Uncertainty of admitting such a Proof. First, you have had some Account from Mr. *Erasmus Lewis*, of the known Practice of one *Brockett*, who was able to counterfeit any Man's Hand or Seal in such a Manner

Manner, that even the Person, (whose Hand or Seal it was) should not be able to distinguish it from his own.

Then we produced to your Lordships two Seal-gravers, who fully attested the same thing. Mr. *Atkins* said, that he himself could make such an Impression, so as not to be distinguish'd by any Artist, and give it the very same Lustre. That he could even take an Impression from a broken Seal, and though there would at first necessarily be some little Flaw in it, yet he said he could mend it, and then make such an Impression from it, that even an Artist could not discover it from the Original.

Mr. *Johnson*, another eminent Seal-graver, likewise told your Lordships, that he could do the same Thing: In particular, That he had once such an Impression taken in Paste by one Mr. *Wisembergh*, and from that he made another Impression, so perfect and exact, that Mr. *Wisembergh* himself could not distinguish one from the other: But as to the Seals of these two Letters, he doubted very much whether they were made by the same Seal or not; and from some little Strokes in the Head, that were very visible to any one, tho' not so easy to be expressed, he rather inclin'd to believe, that they could not be made from one and the same Seal.

And when your Lordships were pleas'd to enquire of them, How such a Thing was practicable? They did not cover themselves (as their Decypherer did) by saying, It would discover the Secrets of their Art; but frankly told your Lordships, the very Manner and Method of doing it.

Their own Seal-graver, Mr. *Christian*, owned, That this might be done, altho' he had never done it: And in the Experiment made on Mr. *Raulus*, their other Seal-graver, he was once plainly in the wrong, as well as once in the right. And it manifestly appears from every one of their Testimonies, that this Practice of taking Impressions is very easy. And, as one of my Noble Lords informed the House, his Footman could do it as well as any of them; and, as your Lordships Yesterday observ'd, even to deceive Mr. *Raulus* himself, who, they say, is so great an Artist. And therefore, my Lords, it is a most dangerous Sort of Proof, and too uncertain at the best, to receive any judicial Countenance in a criminal Matter.

So that I must humbly insist, that this Part of the Charge against my Lord Bishop has not been proved any better than the former; and that when your Lordships do consider the Evidence that has been given on the one Side as well as on the other, as to this particular Charge, we hope you will be of Opinion, that there is no just or reasonable Ground to presume, that these Three Letters were wrote by Mr. *Kelly*, and much less that they were dictated by my Lord Bishop.

The next general Charge against this Reverend Prelate, was, the Receiving of Two Letters from abroad, in Relation to this Conspiracy. The Council indeed for the Bill have wav'd the Letter signed *Digby*, address'd to *Wesson*, and (as I apprehend from them last Night) did not now pretend to prove any Thing concerning the Bishop, under the Name of *Wesson*.

Neither have they as yet pretended to prove, that the other Letter from *Motfield* to *Illington* ever came to his Lordship's Hands, or in whose Hand-writing it was wrote; though if it were the Lord *Mar's* (as it is supposed) many of your Lordships must have been well acquainted with it. Nor has it been yet said, that my Lord Bishop ever return'd any Answer to it.

And as we have now proved, (and fully too, we apprehend) the Letters of the 20th of *April*, to which this is supposed to have been an Answer, to be a mere Fiction or Imposition upon the Bishop; this, which is designed as an Answer to it, must likewise fall to the Ground, as Part of the same Contrivance.

The next and last general Charge arises from the Coincidencies of Times and Names in the intercepted Correspondence, the more readily to induce your Lordships Belief, that my Lord Bishop was really meant by that Correspondence.

Some of them I accounted for before, as Truths publicly known, but turned by ignorant and malicious Correspondents to ill Purposes, or else as absolute Falsties, and manifest Mistakes.

We have shown your Lordships by various Reasons, that the fictitious Names supposed to denote my Lord Bishop, cannot be applicable to him, with any Colour, Truth or Decency; that there is a great Doubt to be made, whether many others of those fictitious Names were really intended for the Persons supposed to be denoted by them; and especially, that *Jackson*, to whom the Letter of the 20th of *April* is addressed, we have proved by various Arguments, and even from those Lights the Committee have afforded us, could not possibly mean the Pretender, whomsoever else it may mean; and consequently that that Letter, (if it were wrote by *Kelly*, and dictated by the Bishop) cannot be High Treason.

And as to the Articles of Times, and the Accounts of my Lord Bishop's coming and going, it must be owned, they are sometimes right, but as often wrong.

There is no doubt, but the Correspondents on this Side the Water, whoever they were, whether out of Malice or Vanity, or out of any other Inducement, apprized themselves as well as they could, of the Bishop's Motions to and fro, in order to give the better Colour or Probability to what they said of him. But yet it has happen'd unluckily to them, as your Lordships have heard, that out of Six or Seven Instances occurring in these Letters, Two only are true; Two of them may be doubted whether true or false, because ambiguously expressed; but Three of them are gross Mistakes, as appears even by the Accounts of their own Witnesses.

And the Mistakes are the more remarkable, because they all affirm the Bishop to have been in the Country, when he positively was not; whereas it was Ten to One, but that the meer Guesses of a Stranger at that Time of the Year had been true; and the rather, because his Lordship was really in the Country Ten Days to One that he was in Town all last Summer.

There is another Thing remains for me yet to speak to, and that is the Intimacy of my Lord Bishop with Mr. *Kelly*; which was likewise thrown in to swell the Number of Circumstances, and as another weighty Argument to induce your Lordships Belief of the foregoing Matters.

But has any Thing appeared to your Lordships like it, even upon their own Evidence? First, a Chairman is brought to tell your Lordships that he carry'd Mr. *Kelly* to the Deanery Three or Four Times about Four Years ago, but the Bishop was not once at Home. And a Porter says, he carry'd Two Letters from *Kelly* to the Bishop; one of them about *Christmas* last was Twelve-Month, and the other Letter some Time before that, but received no Answer in Writing, nor Message, but only his Service to Mr. *Kelly*. But there is one extraordinary Circumstance, which shows him, I confess, to be a very willing Evidence, though not so very likely and credible; that is, that this Porter, dirty as he must be in the midst of Winter, deliver'd his Message to the Bishop in his Bed-Chamber.

And *Malone*, the Person that usually attended Mr. *Kelly*, and went on his Errands, was asked to the same Purpose; and one might have expected that he should have given some Account of it, and had been often employed on Errands to and from the Deanery: But I submit it to your Lordships Memory, whether he did not say, that he never was at the Deanery in his Life-time, nor did know to this Day where it stood?

Mrs. *Killborn*, with whom Mr. *Kelly* had lodged a considerable Time, says, she remembers a Message once came to *Kelly* from the Bishop; but positively denies that my Lord Bishop's Coach ever came to fetch Mr. *Kelly* at her House, as that Honourable Committee have been pleased to affirm in their Report. And I appeal to your Lordships Memory, whether Mrs. *Barnes*, whom the Counsel for the Bill think so credible a Witness in some other respects, and with whom it must be confess'd *Kelly* frequently lodged, was not equally positive in this Matter, and that she did not believe there could be any Friendship or Intercourse between the Bishop and Mr. *Kelly* without her knowing of it.

Thus the supposed Intimacy and great Acquaintance between my Lord Bishop and Mr. *Kelly* stand upon their own Evidence. And I beseech your Lordships to consider, what Sort or Degree of Proof all this can possibly amount to. But we have shown your Lordships the direct contrary, by no less than Ten Witnesses, Servants to my Lord Bishop, some or other of which were always with him, whether he was in Town or in the Country, and every one of them has lived with his Lordship above Two Years; and they say, as it were with one Voice, that

that they don't remember any such Person or Name as *Kelly* or *Johnson* coming to the House; as they must have remember'd him, they say, if he had been frequent in his Visits or Messages; and some of them say, they usually wrote down the Names of those that did come; and the Coachman in particular, who has liv'd Four Years with his Lordship, and appears now as Evidence against the Bishop, and therefore cannot be suppos'd partial to him in his Testimony, is yet as positive and peremptory, that he never saw Mr. *Kelly*, or *Johnson*, at his Master's House, in all his Time. And being carry'd to the Tower by a Messenger, to see if he could recollect his Face, then frankly own'd, He had never seen his Face before. And being ask'd, How he could pretend to know all Persons that came to the House, whose Business was at the Stables? He told your Lordships, That he was as often in the House, us'd to wait at the Table when Company was there; and that let him come which Way he would, he should have seen him coming or going, or have heard of him in the Family, if he was a Person that had frequented his Master's House.

Some of the other Servants likewise spoke as fully to these Circumstances.

We have likewise shewn your Lordships by Mr. *Pope*, who has been for these Two or Three last Years, the most constant Companion of his Lordship's Hours; Two or Three Days, he says, almost in every Week, and an Hour or Two almost in every of those Days: That his Lordship generally sat in one Room, which I think was his Bed-Chamber; that he was admitted to him at all Hours, and into all Companies, and never found the Discourse change at his coming in. That his Lordship never in the least discover'd any Thoughts or Intentions like those now charged upon him; but had heard occasionally many Things drop from the Bishop, of a Tendency directly contrary: And to this we might have called many others, if it were necessary.

We were likewise ready to lay before your Lordships, several laborious and intricate Searches, several Publick Buildings, and Controversies in Matters of Literature with different Persons, which my Lord Bishop was engaged in last Summer; and would have been a full Employment for some Mens whole Lives: But your Lordships did not think it necessary; being (as we hope) fully satisfied and convinced of my Lord Bishop's Innocency, by that Variety of Proof which we had before made.

There are, my Lords, some other Observations that might be made; but have been, I doubt not, already much better taken notice of by the Learned Gentleman that spoke before me: And I think this is the Substance and Purport of the Evidence that has been hitherto offer'd on both Sides.

What the Issue or Success of this long Hearing may be, I know not; That is in your Lordships Pleasure only to determine; to Acquit, or to Condemn: But I hope you will say, We find in him no Fault at all.

The Proof which has been against the Bishop, (if it can deserve that Name) has neither been such as is reasonable in it self, nor agreeable to the known Rules and Proceedings of Law; but chiefly by Probabilities, Circumstances, Conjectures and Suppositions: Whereas we have encounter'd and disprov'd even them, by far greater Probabilities, much stronger Circumstances, and also by such Evidence, as would be convincing and sufficient in any Court of Law or Equity within the Kingdom.

And, upon the whole, I hope I may venture to affirm, That there does not now remain the least Suspicion of the Charge brought against the Bishop; not even a Suspicion of a Suspicion of High-Treason; not one probable Probability, or one presumptive Presumption: I mean, That there is not now remaining before your Lordships, the least Degree of Probability, or the very lowest Sort of Presumption that is known in Law: And therefore, shall humbly conclude with the same Prayer Sir *Constantine Phipps* has made before me, That your Lordships will reject this Bill.

F I N I S.

N. B. Immediately after the foregoing Defence, the Lord Bishop of *Rochester* made his own Speech, which will be published in due Time. And the *Monday* following Mr. *Reeves*, one of the Counsel for the Bill made his Reply, and produced some new Evidence. To which the Counsel for the said Lord Bishop were permitted to rejoin: and then Mr. *Wearge*, the other Counsel for the Bill, concluded.

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